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In The

Supreme Court of the United States

October Term, 1978

No. 78-345

JOHN MOATS and ROBERT J. ROCKWELL,

Petitioners,

vs.

LESLIE LANDRUM, Special Administratrix of the Estate of Roy Lee Landrum, Deceased,

Respondent.

From The United States Court of Appeals For The Eighth Circuit

PETITION FOR CERTIORARI

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From The United States Court of Appeals For The Eighth Circuit

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PETITION FOR CERTIORARI

—o—

Petitioners seek review from the judgment of the United States Court of Appeals for the Eighth Circuit, entered on 30 May, 1978, reversing a decision from the United States District Court for the District of Nebraska. This Petition is submitted to seek resolve of a conflict of a matter which involves principles of such critical importance that settlement is imperative.

—o—

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in Leslie Landrum, Special Administratrix of the Estate of Roy Lee Landrum, Deceased, Appellant versus John Moats and Robert J. Rockwell, Appellees—No. 77-11656—is not yet reported. The opinion, in the form of a slip opinion, is set forth in full in the Appendix commencing at page A-1.

—o—

GROUNDS FOR JURISDICTION

On May 30, 1978, judgment was entered by the Eighth Circuit reversing a Defendants' verdict delivered by a jury in the action below, remanding the same for a new trial. On June 26, 1978, mandate was issued to the Clerk of the United States District Court for the District of Nebraska. It is from this decision that Petitioner seeks review by Petition for Certiorari.

Jurisdiction to review the judgment of the Eighth Circuit is conferred upon this Court by virtue of 28 U. S. C. §§ 1254 (1); 2101 (c); and 2106. No Motion for Rehearing is presently pending, nor do Petitioners intend to take such action.

—o—

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the exercise of potentially deadly force by a police officer, when in his opinion all other means have failed, in order to effectuate the arrest of a fleeing felon is per se excessive; thus establishing the denegation of an articulable constitutionally secured right, without due progress of law, which is subject to redress within the ambit of 42 U. S. C. § 1983, presuming the fleeing felon does not appear to pose an immediate threat to the safety of the officer or any other person.

(2) Whether the Circuit Court erred in construing the applicability of the Nebraska Self-Defense Act to law enforcement officers.

—o—

STATUTES INVOLVED

AMENDMENT 14 *Section 1. Citizens of the United States.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. § 1343. *Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Vol. 28 USCS §§ 1338-1441 1977 pp. 59, 60.

42 U. S. C. § 1983. *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Vol. 42 USCS §§ 1861-1983, 1978 p. 319.

42 U. S. C. § 1988. *Proceedings in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,

so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Vol. 42 USCS §§ 1984-2000e(5), 1978 p. 47.

28-833. *Terms, defined.* As used in sections 28-833 to 28-843, unless the context otherwise requires:

(3) Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, shall not constitute deadly force;

(4) Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and

immunities afforded him by sections 28-833 to 28-843, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions.

R. R. S. Neb. 1943, Vol. 2A, Reissue 1975, pp. 231-232.

28-839. *Use of force in law enforcement.* (1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

(a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(5) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful; *Provided,* that he does not believe the arrest is unlawful.

(6) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, if:

(a) He believes the arrest is lawful; and

(b) The arrest would be lawful if the facts were as he believes them to be.

(7) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm

upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(a) Any limitations imposed by the other provisions of sections 28-833 to 28-843 on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(b) The use of deadly force is not in any event justifiable under this subsection unless:

(i) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(ii) The actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(8) The justification afforded by subsection (7) of this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

R. R. S. Neb. 1943, Vol. 2A Reissue 1975 pp. 237-239.

STATEMENT OF THE CASE

Plaintiff is the mother and special Administratrix of the Estate of Roy Lee Landrum, who was fatally shot by either Defendant John Moats or Defendant Robert Rockwell, duly authorized and acting police officers of the Omaha Police Division, as he fled attempting to avoid arrest for the commission of a felony.

The pertinent facts surrounding the shooting of Landrum elicited during trial of this action are as follows: On August 15, 1975, at approximately 2:40 A.M., Officers Moats and Rockwell responding to a police dispatch of burglary in progress observed an individual exiting a window from a service station located at 4501 Florence Boulevard in Omaha, Nebraska. Leaping from the cruiser, Officer Rockwell shouted to the individual: "Stop, police." The man apparently hearing the warning crouched and turned toward the officers, looking directly at them. He then turned and commenced to run, attempting to avoid arrest. Officer Moats fired one shot at the fleeing suspect while standing near the cruiser. The shot missed and both officers began foot pursuit keeping him under continuous observations, reiterating their order to halt on several occasions. Recognizing they were rapidly losing contact with the suspect, the officers stopped, fired four shots at the suspect, nearly simultaneously, one of which struck him in the lower back—fatally wounding Roy Lee Landrum.

Plaintiff, Leslie Landrum, mother of the decedent and special Administratrix of his estate, commenced an action in the United States District Court for the District of Nebraska pursuant to 42 U. S. C. §§ 1983 and 1988, in her

own behalf and that of decedent's next of kin, for the taking of Plaintiff's decedent's life without due process of law. Jurisdiction of the Court was invoked pursuant to 28 U. S. C. § 1343 (3). Plaintiff sought further relief, by the Court's discretionary power of pendent jurisdiction, for an action in the form of an assault against Plaintiff's deceased.

On the day of trial Defendants filed a Motion to Dismiss the action founded upon the principle that 42 U. S. C. § 1983 does not independently or in conjunction with state law (§ 1988) accord a cause of action to a decedent's next of kin for the alleged taking of decedent's life without due process of law where Plaintiff has not alleged the denial of any right secured to her. Defendants' motion was denied in its entirety. At the instruction conference, Defendants objected to particular instructions for reasons in line with their previous Motion to Dismiss. Defendants' objections were overruled. It is of particular note, that while the action was commenced to redress the taking of decedent's life, the jury was instructed that the measure of recovery in the action was the pecuniary loss sustained by the next of kin in whose behalf the action was brought—notwithstanding the total absence of any allegation against Defendants purporting to abridge any constitutional right secured to the next of kin.

Despite wholly unfavorable instructions, the jury promptly found for the Defendants. On July 1, 1977, Plaintiff filed Motions for a New Trial or alternatively for Judgment N. O. V., which, after oral argument, were denied on July 29, 1977. The propriety of granting

Plaintiff's Motions was appealed together with other sundry issues to the Eighth Circuit Court of Appeals.

The Circuit Court considering the issue of standing ruled that 42 U. S. C. § 1988 permitted reference to state law to determine whether an administratrix might litigate the taking of decedent's life and summarily ruled that 30-810 R. R. S. Neb., 1943, the state Wrongful Death Act, accorded Plaintiff standing to litigate decedent's death (slip op. fn. 2). The Circuit further ruled it had subject matter jurisdiction of the action, readopting its former ruling in *Mattis v. Schnarr,* 547 F. 2d 1007 (C. A. 8, 1976), vacated as moot sub nom. *Ashcroft v. Schnarr,* 97 S. Ct. 1739 (1977) that the right to life is fundamental and is protected against unreasonable or unlawful takings by the procedural due process safeguards of the Fifth and Fourteenth Amendments (slip op. pp. 6 & 7).

The Circuit went on to hold that because state law, as it was construed by the District Court,[1] precluded the exercise of deadly force by a police officer, except in circumstances not attendant to this action, the actual use of such force was per se violative of the basic requirements of

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1 At trial, the District Court found that 28-839, R. R. S. Neb., 1943, had application to Petitioners. In so ruling, the Court based its interpretation upon the dicta found in *Mattis v. Schnarr,* supra (slip op. fn. 12), which suggests that the Circuit had erroneously concluded that Nebraska had adopted the Model Penal Code approach concerning the use of deadly force (filing 57, B1). This conclusion had been determined by the Circuit Court without the benefit of the legislative history or consideration of 28-833, R. R. S. Neb., 1943. In the instant case the Circuit Court brings the misconstruction of Nebraska's use of force statute full circle by now relying on the Trial Court's "study of the issue". They have in effect "affirmed" their own erroneous interpretation.

42 U. S. C. § 1983 and thus unconstitutional. Because the action resulted in decedent's death, the taking of his life was a deprivation of the fundamental right to life without due process of law.

Plaintiff's Motion for Judgment N. O. V. was deemed properly overruled since Defendants were entitled to a good faith defense (which was not instructed upon by the trial court) based on reliance upon the standard operating procedures of the Omaha Police Division. The Circuit held that because the instructions of the District Court permitted the jury to determine that Defendants' conduct in exercising potentially deadly force was reasonable, in view of its determination that the use of deadly force under the circumstances attendant to this action was unreasonable as a matter of law, the case should be reversed to permit Plaintiff a new trial.

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ARGUMENT

The immediate effect of the Eighth Circuit opinion in this action, is to establish a conflict of authority among the Circuits in the Federal Court system. While there has been agreement among the Circuits that the exercise of potentially deadly force by a police officer to effect the arrest of a fleeing felon is not per se in excess of that authority permitted him by the Constitution, the Eighth Circuit has concluded otherwise. The Circuit

Court has determined that the exercise of potentially deadly force by Petitioners, to effect the arrest of a fleeing felon who does not appear to pose an immediate threat to the officer or to the safety of others is the exercise of force which is unreasonable per se. *Since death resulted,* the act is an unconstitutional taking of the life of Roy Lee Landrum without due process of law.[2]

In an attempt to ascertain whether allegedly tortious conduct is subject to redress within 42 U. S. C. § 1983, a court must determine whether constitutional standards have been violated. Clearly what may be appropriate or inappropriate at the state level may not be the same within the guides of the Constitution. The measure of liability within § 1983 is not whether state law has been violated. Rather, it is whether the inhabitant of the State has been deprived of a constitutional right. *Screws*

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2 The Eighth Circuit has persisted in this conclusion first reached in *Mattis v. Schnarr,* 547 F. 2d 1007 (C. A. 8) vacated as moot sub. nom. *Ashcroft v. Schnarr,* 97 S. Ct. 1739 (1977) that the use of deadly force, is an impingement upon the right to life. Such a conclusion is questionable since it presupposes death as being the result of the exercise of the force. Because it is the use of the force by the officer which is challenged, it seems more likely that if any right is jeopardized, it is the individual's right to be free from unconstitutional abuses of his physical integrity under color of law, which is embraced by the Fourteenth Amendment's safeguard from deprivation of liberty without due process of law. To conclude otherwise serves to the constitutionality of the officer's conduct to the extent of the injury sustained by the individual.

v. United States, 325 U. S. 91. In this instance, the law of the State of Nebraska, while relevant, cannot of itself serve as the sole touchstone in determining constitutionally permissible conduct. The elementary requisites of the Civil Rights Act dictate that a police officer when effecting an arrest may employ such force as is reasonable and necessary. *Howell v. Cataldi,* 464 F. 2d 272 (C. A. 3, 1970), § 1983, tolerates neither brutal police conduct, *Rosenburg v. Martin,* 478 F. 2d 520, 526, nor the application of such force as will shock the conscience. *Rochin v. California,* 432 U. S. 165 (1952). But to exceed the standards established by the Constitution, conduct must exceed standards of decency more or less universally accepted. *State of Louisiana, ex rel. Francis v. Resweber,* 329 U. S. 459, 469 (1947) concurring op. Frankfurter, J.

A Court is not free to simply elevate whatever position it may deem appropriate to be that which is countenanced by the Constitution. Nor can liability be gleaned by looking to a single source. A Court is compelled to examine the prevailing view of the Country with an eye to traditional sources, common law, current cases and commentary. *Scheuer v. Rhodes,* 416 U. S. 327, 40 L. Ed. 2d 90, 101, 102, 94 S. Ct. 1683; *Pierson v. Ray,* 386 U. S. 547 (1967). While nowhere within its opinion does it appear the Court went beyond the bounds of the Nebraska Statute in reaching its conclusion, the determination by the Circuit is tantamount to a declaration that the Nebraska Statute—as that Court would construe the same—embodies what is dictated by Constitutional requisites. The decision mandates that for a police officer to exercise deadly force in circumstances other than these ex-

cepted by 28-839, supra, is to exercise force which is beyond that countenanced by reasonability and which, as a matter of law, is a denegation of a constitutional safeguard. This declaration is repugnant to the decisions of those Circuits which after due consideration to the history and current status of the common law privilege of a police officer, have uniformly concluded that the exercise of deadly force by the officer to effect the arrest of a fleeing felon within the framework of circumstance similar to that at bar is not per se unreasonable force. *Jones v. Marshall,* 528 F. 2d 132 (C. A. 2, 1975); *Qualls v. Parrish,* 534 F. 2d 690 (C. A. 6, 1976); *Wiley v. Memphis,* 548 F. 2d 1247 (C. A. 6, 1977), cert. den. *See also, Beech v. Melancon,* 465 F. 2d 475 (C. A. 6, 1972), cert. den. 409 U. S. 1114 (1973); *Cunningham v. Ellington,* 323 F. Supp. 1072 (W. D. Tenn. 1971). These Courts have determined and, Petitioners submit, properly so that the common law privilege concerning use of deadly force survives the implementation of § 1983.

The decision of the Court in this action thus creates an unfounded and unworkable conflict among the decisions of the Eighth Circuit. The magnitude of the issue dictates that the conflict be resolved by this Court.

* * *

Not only has the lower court's opinion created turmoil within the federal court system, it has the direct effect of determining a critical state issue. Moreover, it does so in such a manner as to be in conflict with the applicable State law on the subject. The Circuit has concluded without the benefit of state judicial guidance, that

28-839 restricts the exercise of potentially deadly force by duly authorized police officers.

This conclusion is derived without consideration of the legislative intent reflected by the unequivocal language of 28-833 (4), as amended post original implementation of 28-831 et seq. Reference by both the Trial Court (B-3)) and the Court immediately below (slip op. p. 12) to the legislative history of the Model Penal Code indicates both judiciaries have misperceived Petitioners' contention. While they concede that the Model Penal Code was intended to have application to police officers, Petitioners submit the intent of the Nebraska Unicameral was to the contrary. The legislative history of the statutory schema—a certified copy of which had been supplied to the Circuit (C-1)—bears out this contention. To construe application of 28-839 to Petitioners is to ignore legislative purpose. There can be no question that the Unicameral intended to not place any of the strictures imposed by this legislative act upon a police officer in the discharge of his duties. There can be no question that the Unicameral acted to implement their intent by amendment of 28-833 (4). There can be no question that the privilege concerning the propriety of the exercise of deadly force accorded a police officer at common law (*Breese v. Newman,* 179 Neb. 878, 149 N. W. 2d 805; *Wright v. Hafke,* 188 Neb. 270, 196 N. W. 2d 176) was preserved by this amendment. (Legislative History C-92, 93; 96, 97, cf., 28-833 (4) with Legislative Bill 895,

Section 1, subparagraph (4) C-100 together with Legislative Bill 1278, Section 2, subparagraphs (4) and (6) C-162, 163.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, TIMOTHY M. KENNY, do hereby certify that three copies of the above and foregoing PETITION FOR CERTIORARI, together with items appended thereto, were sent by depositing same in a United States mail box, with first class postage prepaid, addressed to Charles O. Forrest, attorney of record for Respondent, 1716 North 90 Street, Omaha, Nebraska, on this 28 day of August, 1978.

/s/ Timothy Kenny

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1656

Leslie Landrum, Special Administratrix of the Estate of Roy Lee Landrum, Deceased,

Appellant,

vs.

John Moats and Robert J. Rockwell,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: January 11, 1978

Filed: May 30, 1978

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Leslie Landrum, special administratrix of the estate of her son, Roy Lee Landrum, brought a civil rights action under 42 U. S. C. § 1983 (1970) and a common law tort action against Omaha police officers John Moats and Robert Rockwell seeking damages for the shooting death of her son as he fled from the scene of a burglary. The jury found for the defendants, and the district court denied post-trial motions for judgment notwithstanding the verdict or a new trial. Plaintiff then brought this appeal asserting primarily that the district court erred in its rulings on these post-trial motions. In support of

the verdict, appellees Moats and Rockwell contend that under an appropriate construction of Nebraska law they were not liable as a matter of law.

Based on our review of the record, we affirm the order of the district court denying judgment n.o.v. We reverse the order denying a new trial, however, and remand to the district court for a new trial.

I. *Factual Background.*

On August 15, 1975, at 2:40 a.m., a police dispatcher informed officers Rockwell and Moats that a burglary was in progress at a service station located at 4501 Florence Boulevard, Omaha, Nebraska. The officers proceeded immediately to the address. As they entered the driveway of the station, they saw the decedent, Roy Lee Landrum, exit through a window on the north side of the station, jumping onto some tires and debris and then down to the ground. Both officers leaped out of the car, and officer Rockwell hollered: "Stop, police."

Landrum apparently heard the shout and crouched down, looking directly at the officers. He then turned to the east and ran. Officer Moats fired a single shot at him while standing by the police car. The shot missed, and both officers chased Landrum, shouting at him to halt, until they reached the northeast corner of the station. There they stopped and began firing at Landrum as he ran away, each firing two shots almost simultaneously. One of the bullets struck Landrum in the back, killing him.[1]

1 The parties all agree that either officer Moats or officer Rockwell fired the fatal shot, but whose bullet killed Landrum was not conclusively established at trial.

No weapons were found on Landrum. At trial, both officers testified that they had no reason to believe that Landrum was a threat to their safety or to anyone else's. The officers justified the use of deadly force on the grounds that they believed that Landrum would escape unless they shot him. In doing so, both relied on a directive of the Omaha police department, effective at the time of the incident, that among other things permitted a police officer to use his firearm in the performance of his duty to

> effect the arrest or capture, or prevent the escape or rescue, of a person whom the officer knows or has reasonable grounds to believe has committed a felony, when all other means have failed.

II. *Subject Matter Jurisdiction.*

Although neither party has raised the jurisdictional issue and the district court assumed jurisdiction, it is well settled that "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer,* 293 U. S. 237, 244 (1934) (footnote omitted). Therefore, we deem it appropriate to discuss the federal jurisdictional basis for this action.

Shortly after the death of her son, on November 7, 1975, Leslie Landrum filed the present action in the United States District Court for the Eastern District of Nebraska.[2] In count I of her complaint, she contended

2 The issue of standing was not discussed by either party, but because it is an element of the article III requirement

(Continued on next page)

that officers Moats and Rockwell had deprived her son of constitutional rights, violations of which are actionable under 42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Count II of the complaint was a pendent state tort claim for assault and battery.

In order for the court to have subject matter jurisdiction, the pleading must, on its face, state a cognizable claim for relief. In a section 1983 action, the plaintiff must be able to point to a specific, articulable constitutional right that is transgressed.

In the present case, plaintiff-appellant asserts violations of fourth, fifth, sixth, eighth, and fourteenth amendment rights:

(Continued from previous page)

of a case or controversy a brief comment is in order. In proceedings to vindicate civil rights, 42 U. S. C. § 1988 (1970) authorizes reference to state law for questions left unanswered by the applicable federal law. Because § 1983 does not mention standing, we must turn to Nebraska law in order to ascertain whether Leslie Landrum, the decedent's mother, has standing to prosecute this action. We hold that she does. *See* Neb. Rev. Stat. § 30-810 (1975 reissue); *cf. Mattis v. Schnarr*, 502 F. 2d 588, 593 (8th Cir. 1974).

> That the acts of the Defendants, John Moats and Robert J. Rockwell, under color of law and under color of their authority as police officers of the City of Omaha, as hereinabove set out, deprived Roy Lee Landrum of his rights, privileges and immunities guaranteed to him as a citizen of the United States, by Amendments 4, 5, 6, 8 and 14 of the Constitution of the United States, to Plaintiff's damage in the sum of $1,000,000.00, and $3,000,000.00 punitive damages.

Although the complaint did not specify either the nature of the right violated or exactly which constitutional provision protected it and how, each of these amendments could be plausibly construed to forbid the use of deadly force on a fleeing felon who has not used violence in the commission of the felony and who poses no threat to anyone.[3]

Plaintiff-appellant's vagueness is somewhat understandable, for while this court has entertained similar section 1983 actions in the past and assumed subject matter jurisdiction,[4] our sole decision clarifying the precise nature of our jurisdictional power was vacated on procedural grounds by the Supreme Court, and thus no longer

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3 Each of these possible constitutional bases, with the exception of the sixth amendment, is thoroughly canvassed in Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. C. R.-C. L. L. Rev. 361, 371-88 (1976).

4 *See Russ v. Ratliff*, 538 F. 2d 799 (8th Cir. 1976), *cert. denied*, 429 U. S. 1041 (1977). In *Russ*, a case in which the police shot to death a traffic offender in custody, we held that the use of excessive force against a prisoner stated a cause of action under section 1983. We did not, however, specify the exact basis for jurisdiction over that cause of action.

stands as binding precedent. *Mattis v. Schnarr,* 547 F. 2d 1007 (8th Cir. 1976) (*Mattis II*) (*en banc*), *vacated as moot sub nom. Ashcroft v. Mattis,* 97 S. Ct. 1739 (1977). *See also Mattis v. Schnarr,* 502 F. 2d 588 (8th Cir. 1974) (*Mattis I*) (*three-judge panel*). In *Mattis,* a case with facts nearly identical to his case,[5] this court ruled unconstitutional a Missouri statute that permitted the police to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony and who does not threaten the lives of either the arresting officers or others. Prior to its holding on the merits, the court assumed jurisdiction by first declaring that an individual has a fundamental right to life, and then finding that right protected against unreasonable or unlawful taking by the procedural due process safeguards of the fifth and fourteenth amendments. 547 F. 2d at 1017-20. The court

5 Michael Mattis, age eighteen, and Thomas Rolf, age seventeen, were discovered in the office of a golf driving range at approximately 1:20 A. M. by police officer, Richard Schnarr. Shortly thereafter, the two boys left the office by climbing out through the back window. Schnarr shouted at the boys to halt. They ran in different directions. Schnarr then shouted, "Halt or I'll shoot" two times. When the boys failed to stop, he fired one shot into the air and one shot at Rolf. Meanwhile, Officer Robert Marek, who had arrived on the scene, ran to intercept the boys. He collided with Mattis as he came around the corner of the building. Both fell to the pavement. Marek grabbed Mattis by the leg. Mattis broke away. Marek ran after him. Marek was losing ground. He shouted, "Stop or I'll shoot." Mattis did not stop. Marek, believing it was necessary to take further action to prevent Mattis's escape, fired one shot in the direction of Mattis and killed him. Both officers believed that the use of their guns was reasonably necessary to effect an arrest and was authorized by valid Missouri statutes. [*Mattis v. Schnarr,* 547 F. 2d 1007, 1009 (8th Cir. 1976).]

declined, however, to find additional constitutional causes of actions implicit in the case based on the eighth amendment cruel and unusual punishment clause and the fourteenth amendment equal protection clause. *Id.* at 1020 n. 32.

Despite the vagueness of the complaint in this case, we find that it states a cause of action under section 1983 conferring jurisdiction on this court. In particular, we readopt the jurisdictional holding in Mattis II: The right to life is fundamental and is protected against unreasonable or unlawful takings by the procedural due process safeguards of the fifth and fourteenth amendments. In view of this holding, we need not consider whether the plaintiff Leslie Landrum has also asserted cognizable claims under the fourth, sixth, and eighth amendments. We note, too, that the circumstances here are distinguishable from *Mattis.* In *Mattis* the police officers relied upon a Missouri statute authorizing their use of deadly force. Here, as we discuss in part III A, the Nebraska statute in question restricted the police officers' privilege of using deadly force.[6]

III. *The Propriety of Judgment N. O. V.*

As stated above, the parties essentially agree on the important facts of the case. Officers Moats and Rockwell

6 The holding of *Mattis II* on the merits was that statutes that authorize police officers to use deadly force against fleeing nonviolent felons are unreasonable per se and thus unconstitutional. As such, it is not implicated by this case, which is a challenge to the reasonableness of individual police action rather than to a legislative grant of power to use deadly force under the circumstances. *See* part III *infra.*

conceded at trial that they had no reason to believe that the decedent, a burglary suspect, had used violence in the commission of the burglary or that he posed a threat to anyone's safety.[7] Both testified that they shot at the decedent to prevent his escape from arrest. For her part, Leslie Landrum does not dispute the existence of probable cause to arrest her son for a felony.

Given the above facts, Landrum proceeded under two alternative theories in prosecuting her section 1983 claim: (1) the shooting death of her son was a per se unreasonable taking of her son's life; or (2) even if not per se unreasonable, it was unreasonable given the circumstances. In addition, she argues here that the good faith defense normally provided police officers in section 1983 sections against them[8] was unavailable to these defendants because it had been expressly preempted by Nebraska law. We consider each of these points separately below.

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7 Nevertheless, in their brief they argue as follows:

> For while Landrum brandished no weapons, nor physically confronted the Defendants, the situation itself represented a threat to their personal safety. * * * [T]he circumstances as a whole—flight into a darkened night in a black neighborhood, concern whether the felon was accompanied by another party—were factors properly causing Defendants to be apprehensive for their personal safety.

We reject this argument. Landrum was shot in the back as he fled. No evidence even suggests the presence of an accomplice or of any threat to the officers' safety or that of anyone else.

8 *See, e. g., Procunier v. Navarette,* 98 S. Ct. 855 (1978); *Pierson v. Ray,* 386 U. S. 547 (1967).

A.

In support of her conclusion that the use of deadly force[9] against a fleeing, nonviolent felon is per se unreasonable, Leslie Landrum relies on this court's interpretation of the fourteenth amendment due process clause in Mattis II,[10] and section 28-839 of the Reissue of Revised Statutes of Nebraska, 1943.

We consider the statutory claim first. Section 28-839 provides, in relevant part, that:

> 28-839. *Use of force in law enforcement.* (1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward the per-

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9 Deadly force is defined in section 28-833 (3) of the Reissue of Revised Statutes of Nebraska, 1943:

> Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

10 The following language in *Mattis II* is particularly relevant:

> The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn, as well as one who kills and ravishes at will. For the reasons we have outlined, the officer is required to use a reasonable and informed professional judgment, remaining constantly aware that death is the ultimate weapon of last resort, to be employed only in situations presenting the gravest threat to either the officer or the public at large. Thus, we have no alternative but to find V. A. M. S. §§ 559.040 and 544.190 unconstitutional in that they permit police officers to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony and who does not threaten the lives of either the arresting officers or other. [547 F. 2d at 1020 (footnotes omitted).]

son of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

(a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Plainly, one of the prerequisites to the use of deadly force was not met in this case. Neither officer Moats nor Rockwell believed, as required by subsection 2 (d), that the crime for which the arrest was made involved the use

or threatened use of deadly force or that a substantial risk existed that the decedent would cause death or serious bodily harm if his apprehension were delayed." Thus it appears that Nebraska has made the use of deadly force against fleeing nonviolent felons unreasonable per se.

In response, however, officers Moats and Rockwell contend that the provisions of section 28-839 do not apply to law enforcement officers. They rely on section 28-833 of the Nebraska Code, which defines the terms used in sections 28-833 to 28-843, including the term "actor." That term, used in the section 28-839 provision concerning use of force in law enforcement, apparently excludes Nebraska law enforcement officers from the requirements of the subsequent provisions:

> 28-833. *Terms, defined* . As used in sections 28-833 to 28-843, unless the context otherwise requires:
>
> • • •
>
> (4) Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by sections 28-833 to 28-843, *except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions* • • •. [Emphasis added.]

As is evident, a direct contradiction exists between the definition of "actor," which excludes law enforcement officers, and section 28-839, which seems to apply to law enforcement officers although it refers only to "actors." The district judge considered that issue and ruled that section 28-839 does apply to police officers, relying on the legislative history and terms of sections 28-833 through

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11 See note 7 *supra*.

28-843, which were intended to adopt the Model Penal Code provisions on the use of force.[12] Based on our review of the same sources,[13] we agree with the district court.

Under these circumstances plaintiff Leslie Landrum established that the police officers had exercised unreasonable force as a matter of law.

Because we have determined that appellant established the use of excessive force as a matter of law, we need not consider her second theory of recovery under

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12 The ruling came in the court's denial of a motion to dismiss by the police officer. The trial court wrote in part:

> The commentary to Section 3.07 of the Model Penal Code clearly indicates that this section is intended to apply to law enforcement officials. See Model Penal Code, tentative draft 8, 55-63 (American Law Institute, 1958). In addition the specific language of Section 28-839 which provides in part:
>
> > The use of deadly force is not justifiable under this section unless . . . (b) such person effecting the arrest is authorized to act as a peace officer. . . .
>
> mandates the conclusion that this section applies to law enforcement officials notwithstanding the general exemption from Sections 28-833 to 28-843, contained in the definitions.

13 In *Mattis v. Schnarr*, 547 F. 2d 1007, 1013 (8th Cir. 1976), *vacated as moot sub nom. Ashcroft v. Mattis*, 97 S. Ct. 1739 (1977), we commented on section 28-839 and concluded that it represented

> the Model Penal Code approach, which permits the use of deadly force only when the crime for which the arrest is made involves conduct including use or threatened use of deadly force or when there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. [Footnote omitted.]

section 1983: that if not unreasonable per se, the force used by officers Rockwell and Moats was unreasonable under the circumstances.

B.

Our ruling that officers Rockwell and Moats used excessive force as a matter of law does not necessarily mean that appellant was entitled to a directed verdict at the close of all evidence, thus authorizing judgment n.o.v. In section 1983 actions for damages, defendants are entitled to a qualified immunity from liability based on good faith belief in the propriety of their actions and reasonable grounds[14] for that belief. *Procunier v. Navarette*, 98 S. Ct. 855 (1978); *Scheuer v. Rhodes*, 416 U. S. 232 (1974).

Thus, for example, "[w]hen a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.'" *Scheuer v. Rhodes, supra*, 416 U. S. at 245, *quoting Pierson v. Ray*, 386 U. S. 547, 557 (1967). A similar guideline must be applied in assessing the propriety of force used by the police to effectuate an arrest. If police officers (1) believe that a certain amount of force is necessary to make an arrest, (2) be-

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14 The paradigm of "reasonable grounds" for a good faith belief in the propriety of official action is reliance on a state statute later declared unconstitutional. *See, e. g., Piersonv. Ray*, 386 U. S. 547, 556-57 (1967). Reliance on less formal state provisions may also be reasonable, *Eslinger v. Thomas*, 476 F. 2d 225, 229 (4th Cir. 1974) (longstanding custom of the South Carolina Senate); *Claybrone v. Thompson*, 368 F. Supp. 324 (M. D. Ala. 1973) (standard operating procedures of prison), and in our view police officers may usually rely on standard operating procedures contained in their police manuals.

lieve that use of that amount of force is lawful under the circumstances, and (3) have reasonable grounds for each of the foregoing beliefs, then they are entitled to the defense of good faith even if the use of force turns out, *ex post,* to have been illegal or excessive. *See Procunier v. Navarette, supra; Wood v. Strickland,* 420 U. S. 308 (1975); *Scheuer v. Rhodes, supra; Pierson v. Ray, supra.*

The defense of good faith is not, as plaintiff-appellant asserts, inapplicable to an action based on excessive force and assault and battery.[15] Nor is it preempted by Nebraska law.[16]

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15 In the instruction conference at trial, counsel for plaintiff-appellant objected to the inclusion of an instruction on the good faith defense:

> Mr. Forrest: The plaintiff would object to Instruction No. 11 in that it permits the defendants the defense of reasonableness in their belief in the valid state law, and there is no question raised by defense counsel at any time during this trial that the law of the state was invalid. The law has existed prior to the date of the incident and I do not feel that the defense of reasonable belief is applicable to this case. Also, with reference to the good faith, the good faith defense is not, in my opinion, applicable to a case involving excessive force and assault and battery. It pertains to a case involving false arrest, malicoius prosecution, where the issue of probable cause arises. That issue is in no way in plaintiff's view present in this case. There is no claim of false arrest, no claim of malicious prosecution involved. Common law, the defense of reasonableness, belief, and good faith, were not available to the torts of assault and battery and we would cite Monroe vs. Pape. Plaintiff objects to Instruction 11 for those reasons.

The trial judge overruled the omjection. In this appeal, plaintiff-appellant reasserts her objection to the instruction,

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again citing *Monroe v. Pape,* 365 U. S. 167 (1961), which she claims noted that, at common law, the defenses of reasonable belief and good faith were not available for the tort of assault and battery. *Monroe* decided no question of immunity, however, and we question plaintiff-appellant's reliance on it. In *Monroe,* the

> police officers did not choose to * * * defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family * * *. [T]hey sought dismissal * * * contending * * * that their activities were so plainly illegal under state law that they did not act [under color of state law] * * * as required by § 1983 [*Pierson v. Ray,* 386 U. S. 547, 556 (1967).]

In our view, section 1983 provides a federal remedy for the redress of wrongs done under the color of state law. As such, state law or

> the prevailing common law view is no longer decisive as to the availability of a § 1983 defense: that view must be considered in light of the policies and purposes of the § 1983 action to determine whether importation of the defense, or allowance of a defense where the common law provides none, is appropriate. *See, e. g.,* Imbler v. Pachtman, 424 U. S. 409, 424-29 (1976); Wood v. Strickland, 420 U. S. 308, 318-22 (1975); Scheuer v. Rhodes, 416 U. S. 232, 238-49 (1974). *Compare* Whirl v. Kern, 407 F. 2d 781, 790-92 (5th Cir.), *cert. denied,* 396 U. S. 901 (1969) (good faith no defense to false imprisonment at common law, so no defense under § 1983), *with* Bryan v. Jones, 530 F. 2d 1210 (5th Cir. 1976) (en banc) (overruling *Whirl* and holding good faith defense generally available in § 1983 damage actions).

Developments in the Law-Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1211 n. 126 (1977). *Contra, Eslinger v. Thomas,* 476 F. 2d 225, 229 (4th Cir. 1973).

16 Plaintiff-appellant relies on section 28-841 of the Reissue of Nebraska Revised Statutes, a provision that she claims preempts the application of good faith defense to this case:

(Continued on next page)

Therefore, in defense of this action for damages, police officers Moats and Rockwell were entitled to rely upon provisions of their manual, even though those pro-

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28-841. *Mistake of law; reckless or negligent use of force.* (1) The justification afforded by sections 28-836 to 28-839 is unavailable when:

(a) The actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) His error is the result of ignorance or mistake as to the provisions of sections 28-833 to 28-843, and other provision of the criminal law, or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 28-835 to 28-840 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosection for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under sections 28-835 to 28-840 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

We doubt that this section applies here for the officers relied upon the law as given to them in their police officers manual. The mistake in interpretation rested with their superiors. In any event, the defense of good faith to a section 1983 action rests on federal policy, not state policy. *See Developments in the Law-Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1211 n. 126 (1977); note 15 *supra.*

visions conflicted with the post-incident interpretations of state law as pronounced by the district court. Thus, their good faith was an issue in the lawsuit.

Because good faith is dependent on motivation and conduct of the defendant as established at trial, the validity of the defense is ordinarily a question for the jury. *Pierson v. Ray, supra,* 386 U. S. at 557-58; *Developments in the Law-Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1209 n. 119 (1977). Moreover, like other affirmative defenses originally predicated on the common law,[17] the burden is on the defendant to prove each element of the defense to the jury's satisfaction.[18] *Cf. Pierson v. Ray, supra,* 386 U. S. at 555-58. The existence of a good faith issue stands as a bar to appellant's claim to be entitled to a judgment n.o.v. on liability. Accordingly, the trial judge correctly overruled plaintiff's motions for a directed verdict and judgment n.o.v.

IV. *The Propriety of a New Trial.*

In arguing that the trial judge erred in denying her motion for a new trial, appellant Leslie Landrum reiterates her excessive force argument, concluding that the jury verdict is contrary to the evidence and instructions. We have already ruled that the policemen used excessive force as a matter of law. We still need to analyze appel-

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17 In *Scheuer v. Rhodes,* 416 U. S. 232, 238-49 (1974), Chief Justice Burger analyzed the historical roots and developments of the defense.

18 Here the officers needed to show that "all other means [of capturing Roy Landrum had] failed," a prerequisite to the use of deadly force according to the Omaha police manual.

lant's argument, however, in light of the principle applicable instructions.

Instruction No. 11 read as follows:

In connection with plaintiff's first and second causes of action, defendants contend that their actions did not deprive the plaintiff's decedent of his federal constitutional rights in that the defendants' actions were lawfully performed within the scope of their authority as police officers. In that regard the defendants claim:

(1) That at the time of the incident in question here, they believed in good faith that they had probable cause to attempt to arrest plaintiff's decedent for a violation of Nebraska law; and

(2) That the force used in attempting to make this arrest was reasonably necessary under the circumstances.

If the defendants reasonably believed that they were acting by authority of a valid state law in attempting to arrest plaintiff's decedent and that they had probable cause as that term is explained to you in these instructions, to attempt to arrest the plaintiff's decedent, and if the defendants acted in good faith on the basis of these beliefs, then the defendants' reasonable belief and good faith would lawfully authorize the defendants to attempt to arrest plaintiff's decedent.

If, in addition, the force utilized by defendants in attempting to effectuate this arrest were reasonably necessary, as explained elsewhere in these instructions, and were not excessive, then you must find for the defendants in connection with plaintiff's first and second causes of action.

If on the other hand you find by a preponderance of the evidence that defendants did not have probable cause to attempt to arrest plaintiff's decedent or if you find that defendants did have probable cause to arrest plaintiff's decedent but used excessive and unreasonable force in attempting to make that arrest, then you may find for plaintiff on the first and second causes of action.

Instruction No. 14 read as follows:

In making an arrest, a police officer may use whatever force is reasonably necessary. Reasonable force is generally that amount of force which an ordinary, prudent and intelligent person with the knowledge and in the situation of the police officer would have deemed necessary under the circumstances.

In determining whether or not the defendants used only such force as was reasonably necessary in attempting to arrest Roy Lee Landrum, you must bear in mind that the statutes of the State of Nebraska in full force and effect at the time of the incident in question provided in part that the use of deadly force in making an arrest is not justifiable unless:

(1) The arrest is for a felony;

(2) The person making the arrest is authorized to act as a police officer.

(3) The person believes that the force used creates no substantial risk of injury to innocent bystanders; and

(4) The person believes that the crime for which the arrest is made involved conduct including the use or threatened use of deadly force or that there exists a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Deadly force is defined as force which a person uses with the purpose of causing death or serious bodily harm or force which the person knows to

> create a substantial risk of death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

Instruction number 11 appears to apply the good faith test to the issue of probable cause to arrest, but as we have noted, the appellant does not contest that the police officers were justified in attempting to arrest the decedent, Roy Lee Landrum. The court, however, failed to instruct the jury that they must consider the good faith defense with regard to the police officers' use of unreasonable force.[19] The jury was simply informed in instruction 14 that "[r]easonable force is generally that amount of force which an ordinary, prudent and intelligent person with the knowledge and in the situation of the police officer would have deemed necessary under the circumstances."[20]

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19 The district court denied the officers' requested instructions in this regard. See note 20 *infra*.

20 Two instructions requested by the defendants correctly embodied the elements of a good faith defense.

The first, defendants' proposed instruction 15, was a segment of the Standard Operating Procedure Manual of the Omaha police department explaining when an officer is allowed to use his firearm while on duty:

> You are instructed that on August 15, 1975, the following police directive was effective with respect to the use of firearms:
>
> An officer may use his firearm in the performance of duty for any of the following reasons:
>
> (a) To defend himself from death or serious injury.

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Thus, the trial court did not submit to the jury any good faith defense relating to the use of a firearm in conformity with the police manual. In essence, the instructions called upon the jury to rule whether the use of deadly force by the police officers was or was not reasonable. By dismissing the action, the jury determined that police officers Moats and Rockwell exercised "reasonable force" in shooting at the fleeing Roy Lee Landrum. But, as we have held in part III of the opinion, such deadly force was excessive under the circumstances as a matter of law. On the theory upon which the case was submitted to the jury, the jury verdict stands

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> (b) To defend another person from death or serious injury.
>
> (c) To effect the arrest or capture, or prevent the escape or rescue, of a person whom the officer knows or has reasonable grounds to believe has committed a felony, when all other means have failed.
>
> (d) To kill a dangerous animal, or to kill an animal so badly injured that humanity requires its removal from further suffering.
>
> (e) To give an alarm or call for assistance when no other means is available.

The second, defendants' proposed instruction 16, explained the god faith defense as applied to the use of deadly force in terms similar to the three-part test we outlined *supra:*

> You are instructed that if Defendants or either of them in using deadly force in effecting the arrest of Plaintiff's deceased reasonably believed deadly force to be necessary to effect the arrest of Plaintiff's deceased and reasonably believed in good faith that they had the authority to use deadly force in the circumstance then attendant, you must reach a verdict for and on their behalf.

unsupported by the evidence and is contrary to the instructions.

Accordingly, appellant is entitled to a new trial. On retrial appellees have the right to a proper instruction on their good faith defense, and they bear the burden of proof on this issue.[21]

Reversed and remanded for a new trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS EIGHTH CIRCUIT.

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21 Because of our disposition of the case, we do not reach appellant's claim of error regarding certain other instructions given by the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 75-0-440

(Filed June 2, 1977)

LESLIE LANDRUM, Special Administratrix of the Estate of ROY LEE LANDRUM, Deceased,

Plaintiff,

vs.

JOHN MOATS, ROBERT J. ROCKWELL,

Defendants.

MEMORANDUM OPINION

I.

DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss, filed on the first day of trial in this matter, asserts the proposition that a cause of action based upon 42 U. S. C. § 1983 does not survive when the injured party dies prior to initiation of the lawsuit.

In *Brazier v. Cherry,* 293 F. 2d 401 (5th Cir.), *cert. denied,* 368 U. S. 921 (1961), the Court held that an action against Georgia police officers for the wrongful death of the deceased allegedly resulting from violations of the feedral civil rights statutes gave rise to a federally enforceable claim for damages since Georgia law provided both for the survival of the claim which decedent had for damages sustained during his lifetime and for right to recovery to his surviving widow for homocide. In so

holding the Court viewed 42 U. S. C. § 1988 as authorizing the federal court to look to state law to fill the gaps in federal civil rights statutes which do not address themselves to the question of survival of remedies. Similarly in *Pritchard v. Smith,* 289 F. 2d 153 (8th Cir. 1961), the Court looking to Arkansas law held that plaintiff's Section 1983 action against defendant survived defendant's death. These two cases were cited by the Supreme Court in *Moore v. County of Alameda,* 411 U. S. 693, 702 (1973) as proper applications of the relationship between Sections 1983 and 1988.

Subsequent cases have generally agreed that an action may be maintained under Section 1983 despite the death of one of the parties where state law, which is incorporated pursuant to Section 1988, so permits. *See Mattis v. Schnarr I,* 502 F. 2d 588, 590-591 (8th Cir. 1974); *Hall v. Wooten,* 506 F. 2d 564 (6th Cir. 1974); *Spence v. Staras,* 507 F. 2d 554 (7th Cir. 1974).

Nebraska law recognizes a wrongful death action pursuant to Sections 30-809 and 810, Neb. Rev. Stat. (Reissue 1975). Nebraska survival statutes are contained at Section 25-1401 and 1402, Neb. Rev. Stat. (Reissue 1975). In addition, Nebraska courts have recognized that a cause of action for damages for injuries sustained by the plaintiff survives notwithstanding the fact that plaintiff dies prior to the initiation of the suit. *See Wilfong v. Omaha & Council Bluffs Street Railway Company,* 129 Neb. 600, 262 N. W. 537 (1935); *Workman v. Workman,* 167 Neb. 857, 95 N. W. 2d 186 (1959).

Accordingly, on the basis of the foregoing discussion, the Court, being fully advised in the premises, has

ruled during the course of this trial that defendants' motion to dismiss was denied, and now enters this memorandum opinion in support of that ruling.

II.

NEBRASKA STATUTES REGARDING USE OF FORCE

Throughout the course of this trial, plaintiff has maintained that Section 28-839(3), Neb. Rev. Stat. (Reissue 1975) sets forth the applicable law in Nebraska regarding the use of deadly force by police officers in attempting to effectuate an arrest. Defendants on the other hand contend that the common law rule which permits the use of deadly force to arrest any felony suspect persists in the State of Nebraska. In support of this position defendants point to the definition contained in Section 28-833 and specifically Subsection 4 of that section which provides:

> Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by Section 28-833 to 28-843, *except any duly authorized law enforcement officer of the State of Nebraska or its political subdivision.* (Emphasis added.)

In attempting to resolve this conflict, this Court is confronted with a problem to which Nebraska courts have apparently not addressed themselves at this time. The legislative history and the terms of Sections 28-833 through 28-843 support the proposition that the Nebraska legislature adopted the provisions of Article III of the Model Penal Code dealing with the use of force. *See also Mattis v. Schnarr II,* 547 F. 2d 1007, 1013 (8th

Cir. 1976 *en banc), vacated* — U.S. —, 45 U.S.L.W. 3751 (1977).[1]

The commentary to Section 3.07 of the Model Penal Code clearly indicates that this section is intended to apply to law enforcement officials. *See* Model Penal Code, tentative draft 8, 55-63 (American Law Institute, 1958). In addition the specific language of Section 28-839 which provides in part:

> The use of deadly force is not justifiable under this section unless . . . (b) such person effecting the arrest is authorized to act as a peace officer. . . .

mandates the conclusion that this section applies to law enforcement officials notwithstanding the general exemption from Sections 28-833 to 28-843, contained in the definitions.

Accordingly, being fully advised in the premises, the Court has concluded that the provisions of Section 28-839, Neb. Rev. Stat. (Reissue 1975) do apply to police officers and further that this statute, which was in full force and effect at the time of the incident giving rise to this lawsuit, sets forth the applicable standards governing the conduct of the defendants.

By the Court:

/s/ Albert G. Shatz
Judge, United States District Court

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1 Although vacated by the Supreme Court, this Court finds the reasoning and logic of *Mattis v. Schnarr II* to be persuasive in regard to the applicability of this statute.

APPENDIX C

CERTIFICATE

I, Vincent D. Brown, Clerk of the Nebraska Legislature, do hereby certify that the attached legislative history pertaining to LB 895 of 1971 is a true and accurate reproduction of committee records and floor debate on file in my office.

Dated this 13th day of October, 1977 in Lincoln, Nebraska.

/s/ Vincent D. Brown
Clerk of the Legislature

MINUTES OF COMMITTEE ON JUDICIARY

April 13, 1971

The Committee on Judiciary met at 2:00 p.m., on April 13, 1971 in the West Senate Lounge, for the purpose of holding public hearings on LB 895.

The meeting was called to order by the Chairman, Senator Roland A. Luedtke, and the roll was called. All members were present.

The statements of intent on these bills are attached and hereby made a part of these minutes.

Senator Luedtke: A quorum being present, we will call the hearing to order, and we have one bill to be heard this afternoon, LB 895. The principal introducer is Senator DeCamp. Would you take over please?

LB 895

Senator DeCamp: Mr. Chairman and members of the Committee, John DeCamp, principal sponsor of LB 895 commonly known as the self-defense bill.

As you can see, we have a virtually empty room. I think that this should attest to the fact that the self-defense bill, the self-defense concept, has been discussed here repeatedly, in depth and in detail.

All people who have come here, either for or against self-defense bills, either criticizing the existing ones or the ones that have been declared unconstitutional, have used the same argument. That argument has been that they were trying to put into law—put into writing—the existing common law.

The opposition to the existing bill, the bill that was declared unconstitutional, was that this really didn't put into law anything. There was no—that there really was no adequate representation of what the common law represented.

A typical example: The classic argument was under the existing bill, the one that was declared unconstitutional, it was perfectly legal to shoot people in watermelon patches and everything. There were no limits. There were do definitions as to what was allowed or as to what was prevented.

Working on the assumption that everyone really was telling the truth, and really did want the common law put into writing; that they were sincere in their arguments, I went ahead and had drafted the model penal code.

The model penal code is written up by the American Law Institute. It puts into writing, very clear writing,

the various aspects of the common law. I had it drafted for this particular section, that dealing with self-defense.

The bill is about twenty-two pages long. It covers about every aspect one could reasonably imagine coming up. What it does, in effect, is tell you that "reasonable means"—as you remember from our previous hearing, there was argument that "reasonable" was ill-defined. Nobody really knows what it means. This bill does say what is reasonable. It uses a reasonable standard and it clearly defines it. So I have very little more to say, other than I think that this bill is needed. In fact, there are a lot of people confused as to whether we really do even have self-defense confused as to whether we really do even have self-defense rights. This would spell out just exactly what these rights are. It would satisfy, I think, both those who opposed and supported the old self-defense law. It costs the state not a dime. It may save the state several hundreds, or thousands, or millions of dollars, in that in the old law somehow a provision that the state could be liable in self-defense cases, which was totally absurd, unheard of and not in law in any other place. So from that standpoint, it could reasonably save the state a lot of money. Any questions.

Senator Luedtke: Senator DeCamp, this model act, you speak of. Is that the same one that I presented at the hearing?

Senator DeCamp: Right. And I'll be perfectly honest with you. This is what prompted me to go ahead. Senator Luedtke, as you mentioned, you stood up here in that fool hearing room, that was right here, and said, "This is the common law put into writing, right here.

This is the model penal code. It has the self-defense law in writing." And you pointed out at that time that it in no way, in no way, was identical with the existing law. Because the existing law simply did not spell out what is reasonable; did not set out enough so that you really knew what you were dealing with. That is what I have drafted here as the model penal code; the very thing that he presented to you earlier.

Senator Luedtke: The Attorney General also knows about this?

Senator DeCamp: The Attorney General knows about this. The Attorney General was the one that prompted me finally to put this into writing in this matter. I went to discuss this matter with him and he gave me a copy of the model penal code, which I then took and had drafted and modified in a very few instances to adapt to Nebraska.

Senator Luedtke: One other question that I had: Do you think that it is at all necessary to pass the constitutional amendment that is before the—in order to have this? Do you think that we need the constitutional amendment?

Senator DeCamp: I'm absolutely convinced that it's a waste of money to do that because the constitutional amendment, no offense intended to anybody who might be supporting this, the constitutional amendment, doesn't draw any more guide lines than the old bill. It changes, as I understand, a couple of words. It says "reasonable" instead of "necessary". But it doesn't say what is "reasonable." And you come up with the same argument. This specifies virtually every type of case that could

arise, and points out what is reasonable or unreasonable. However, let us assume that the constitutional amendment is passed. You are going to be back in the same place and have to say, "Well, what does it really mean?" This would say what the constitutional amendment really meant if that were the case.

Senator Luedtke: Any other questions of Senator DeCamp? Senator Carstens.

Senator Carstens: On page 2, section 3, line 21. It talks about a threat to cause serious . . . and cause death . . . or serious bodily harm by the production of a weapon, or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, shall not constitute deadly force". And I'd hate to be confronted with that in a serious situation and have to decide whether the actor intends to use deadly force if he's got a weapon in his hand.

Senator DeCamp: Where was this, sir? I—

Senator Carstens: Page 2, section 3, line 21.

Senator Luedtke: . . . regarding a threat . . . deadly force and the threat by the production of a weapon.

Senator DeCamp: What was your objection again? I was looking it up.

Senator Carstens: Well the problem there is how do you know when somebody holds a gun in your face whether he intends to . . .? He may be just threatening, be threatening to scare me. Or he maybe be threatening to kill me. How do I know? How is the victim supposed to know?

Senator DeCamp: Well, of course, this would have to be taken in the context of the entire act. I'm sure in the context of the entire act, this very problem you bring up has been researched diligently and thoroughly. As I say, the bill was drawn up by the American Law Institute, and has been tested in a number of states.

And, I can't answer your question right off the top of my head now without taking it in the entire context, but possibly you would have some amendment that you feel would more adequately solve this. I realize that I'm not directly answering your question.

Senator Carpenter: Mr. Chairman, why don't we . . . (inaudible) . . . why don't we give this bill to Mr. Carter? Presuming that you put it out of committee. Let him research it and see if Senator Carstens has a valid point which can be corrected?

Senator Luedtke: Between the time that it gets up for debate and the . . .?

Senator Carpenter: . . . get some amendments on it, of course . . .

Senator Luedtke: . . . assuming that . . .

Senator Carpenter: . . . assuming that we make sense.

Senator Luedtke: That's what—out on General File—

Senator Carpenter: Yes.

Senator Luedtke: Well, I think that it ought to be checked over anyway. I'm not sure . . .

Senator DeCamp: . . . I have no objection to that. I would like to see it go on General File so we can get the

ball rolling. I will work with anybody on any particular amendments that they think need to be made, or researching any particular aspect of the bill that may be confusing to someone.

Senator Luedtke: There may be some . . . It may be that in adapting it, there would be parts that wouldn't even be needed in here.

Senator DeCamp: This is quite correct. I can see this possibility.

Senator Luedtke: Have you double-checked with the Attorney General since since this . . .?

Senator DeCamp: No, I have not.

Senator Luedtke: I think that would . . .

Senator DeCamp: . . . that's another thing that I should do . . .

Senator Luedtke: . . . check this . . .

Senator DeCamp: . . . to see if he has any particular points. We've had all . . .

Senator Luedtke: . . . any other questions? Thank you, Senator DeCamp.

Senator DeCamp: I have no closing.

Senator Luedtke: All right. Are there any others who wish to appear in favor of LB 895?

Senator Chambers: I haven't got very much to say. Mainly I want to sign the list because, as Senator DeCamp is pointing out by introducing this bill, and we've been through a lot on self-defense measures, some

kind of bill is going to be needed to set the public mind at rest. And this could be the vehicle for it, so I'm going to sign the list in behalf of it.

Senator Luedtke: All right, Senator Chambers. Thank you. Any questions of Senator Chambers? Do you have anything further that you wanted to add, Senator Chambers?

Senator Chambers: No, no, that's all.

Senator Luedtke: Okay. Thank you. Any others wishing to appear in favor of LB 895? Seeing none, are there any who wish to oppose LB 895? Again, seeing none, and having waived your closing, Senator DeCamp, that will conclude the hearing on LB 895. And that will conclude the hearing today. And—there's a motion to go into Executive Session? All those in favor say, "Aye."

Chorus: Aye.

Senator Luedtke: Opposed, "Nay." All right. We are in Executive Session.

EXECUTIVE SESSION

LB 895

Senator Carstens moved to advance LB 895 to General File, seconded by Senator Morgan. Motion carried by a vote of 8 in favor (Senators Luedtke, Carstens, Simpson, Morgan, Chambers, Epke, Carpenter, DeCamp); none opposed; and none absent.
*LR 32

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*Later this same afternoon the Legislature voted to suspend its rules and take LR 32 from the committee. The bill was indefinitely postponed on the floor and no public hearing was held. 4-13-71

Clerk of the Legislature, Vince Brown, was asked by the members to appear before the committee to explain certain rules regarding proposed committee action.

Senator Carpenter moved that the committee ask the City of Lincoln for the use of Pershing Auditorium without charge and provide adequate protection so the Judiciary Committee may hold a public hearing on LB 32, seconded by Senator Chambers. Motion carried by a vote of 5 in favor (Senators Simpson, Morgan, Chambers, Carpenter, DeCamp); 2 opposed (Senators Carstens and Epke); and 1 not voting (Senator Luedtke). (Note: April 5, 1971 Executive Session)

Senator Carpenter moved to adjourn, seconded by Senator Carstens. The meeting adjourned at 1:40 P.M.

Chairman, Committee on Judiciary

/s/ Janice Adamoyk
Judiciary Committe Clerk

NEBRASKA STATE LEGISLATURE, 82nd SESSION
INTRODUCER'S STATEMENT OF PURPOSE

LB 895

Senator Luedtke, Chairman
Judiciary Committee

The following constitute my reasons for this bill and the purposes that are sought to be accomplished thereby:

To write into law a self-defense act.

/s/ John DeCamp
Principal Introducer

April 6, 1971

COMMITTEE STATEMENT ON LB 895

The purpose of this bill is to write into law a self-defense act. The reason for such self-defense act was due to the concern of the public after the repeal of the self-defense act passed by the 1969 session of the Legislature which was not only declared unconstitutional by the Supreme Court of the State of Nebraska, but was repealed by the 82nd session of the Legislature. Moreover, the Legislature directed the Judiciary Committee to propose a codification of common law on the subject of self-defense. LB 895 is substantially the Model Penal Code as promulgated by the Federal Government and deals with all areas of self-defense and what is reasonable in connection with the use of self-defense.

Senator John W. DeCamp, principal introducer of LB 895, and Senator Ernest Chambers appeared in favor of LB 895. There were no other persons appearing either for or against the bill.

The bill was advanced to general file by a vote of 8 in favor (Senators Luedtke, Carstens, Simpson, Morgan, Chambers, Epke, Carpenter, DeCamp); none opposed; and none absent.

April 20, 1971 Chairman, Committee on Judiciary
/s/ Roland A. Luedtke

amendments on it because we didn't have the four votes. And frankly, I wanted the four votes to get it out here on the floor so I conceded personally to a few amendments. The pay would be determined by the courts and under the original bill, I think it was a stationary thing and we . . . this . . . if a person was injured the amount

of money that he received shouldbedetermined by a court and not by the legislative act or in the Constitution. It would have to go to court anyhow. I, as I say, move the adoption of the amendment. I'm not so sure that I agree with all of them but my job to make the motion. I hope that the introducer of the bill, the main introducer, will urge you to reject or pass the amendments, the committee amendments, that he does not want that I think I am with him almost all the way on this bill.

President: The Chair recognizes . . . are you through, Senator Syas?

Senator Syas: Yes.

President: The Chair recognizese Senator DeCamp then. He defers to Senator Carpenter.

Senator Carpenter: Well, Mr. President, I think maybe we can simplify this thing. LB895 apparently does the same thing by statute I am attempting to do by changing the Constitution. I'm willing to go and accept 895 as I understand it in lieu of this bill. This is a highly volatile issue and I don't think we ought to get the thing out of proportion or out of the area that is important. So I would like to have this bill passed over with the understanding that if the committee of the Legislature passes on 895 then I will make a motion to withdraw the constitutional amendment.

President: Senator Carpenter has asked unanimous consent to pass over LB763 pending some action later on LB895. Senator Syas, do you object?

Senator Syas: I don't mind Senator Carpenter, I'm a co-signer of the bill, delaying this particular bill. I'm

not objecting but all last session I heard about this other bill and I wondered when we were ever going to get to this other bill. Pardon. Well, it is on General File. Well, it was on General File, I believe, last session. Alright, let's just get to it.

President: Okay, if there aren't any objections then, we will lay over LB763. The Speaker has advised me that we should now shift to LB343 which was about up the other day on General File which is Senator Duis' bill, I believe. LB343.

LB 343

Clerk: Title read. LB 343. There are some short committee amendments,Mr. President. Amendment read.

President: The Chair recognizs Senator Kokes.

Senator Kokes: Mr. President and members of the Legislature, to make it conform with the present statute with 1¢ per ballon to make consistent with the previous statuatory provisions which retain 1¢ per gallon. This 1¢ presently is paid by the people who get tax refunds. Otherwise they get all their refund money back except 1¢ and we wanted that to stay as the present law is. I move that we adopt they forget it or they slip past the date and when they make the filing for the income tax they won't forget it. They'll get their money back and therefore, they will be benefited thereby.

President: Senator Duis, did you make the motion to advance the bill The question is, shall LB 343 as amended be advanced from General File to E & R initial. All those in favor vote eye. All those opposed

vote no. Voting on the advancement of LB343 from General File to E & R initial. Voting on the advancement of LB343. Voting to advance LB343 from General File. Voting on the advancement of LB343. Have you all voted? The Clerk will record the votes.

Clerk: 28 ayes, Mr. President, 6 nays, 15 not voting.

President: LB343 is advanced. Next bill up for General File debate is LB1078, Senator Carsten.

LB 1078

Clerk: Title read. LB 1078.

Senator Carsten: Mr. President and members of the Legislature. I move for the advancement of 1078. Mr. President and members, this is a one-year deal as you are well aware I am sure. The Centennial only comes once every one hundred years and we are proud that the originator of Arbor Day is from Nebraska, was from Nebraska and we do have a state park in his honor at Nebraska City which is in my district. There have been up to this point quite elaborate plans made for the celebration and I am happy to add this morning that an additional effort is being made to bring the President to Nebraska City for the final celebration on the ?????. Our Congressional delegation is working hard on the President and we certainly are in hopes that he is going to come. But this bill does provide for the commission and sets out their duties and they are already active in their duties. It also sets out an appropriation which in getting this into operation but we shouldn't prolong it too long because April is going to be here very soon. I hope that you will see fit to advance this to E & R.

President: Any further discussion of the bill? The question is, shall LB8—excuse me, that is shall LB—Senator Lewis, did you wish to be recognized? The question is, shall LB1078 be advanced from General File to E & R initial. All those in favor vote aye. All those opposed vote no. Have you all voted? Voting on the advancement of LB1078. Once again, have you all voted? The Clerk will record the vote.

Clerk: 34 ayes, no nays, 15 not voting, Mr. President.

President: The bill is advanced. Ready for the General File consideration of LB895. Senator DeCamp's bill. The Chair recognizes Senator DeCamp.

Senator DeCamp: Mr. President and members of the Legislature, in past years the issue and question of self-defense was one of the hottest controversies in this Legislature. I know from reading some of the newspaper clippings the past years that it was one of the reasons there was even a great split among certain senators and personalities came into the issue. Last year two significant things occurred relative to the self-defense issue. First of all, the Nebraska Supreme Court declares a self-defense law that had been passed unconstitutional. And second, the Legislature repealed that law which had been declared unconstitutional. After that law was declared unconstitutional and after talking with all the members of the Judiciary Committee as to what should be done in the area of self-defense I then went to the Attorney General's office and talking and working with him came up with LB895. After drafting 895 and having a hearing on it in the Judiciary Committee, the Judiciary Committee asks one final thing and that was that I again on behalf

of the Judiciary Committee contact the Attorney General and ask him exactly what his attitude was relative to this bill and if he had any comments.

President: Senator DeCamp, I am going to interrupt here for a moment and ask you if you will just stand by while the Clerk reads the introduction to the bill.

LB 895

Clerk: Title read. LB 895

President: Go ahead, Senator DeCamp.

Senator DeCamp: Mr. President, rather than go into a lengthy debate on this issue which has been repeatedly debated I think I can answer most of the questions that will come up merely by reading the letter from the Attorney General to our Judiciary Committee or to myself on behalf of the Judiciary Committee and it says. Letter read. In other words, what he is saying here is that if we are going to change it be very careful because everything we have in it has been tested and is pretty well known. He goes on to say. Letter continued to be read. Now this letter was written last year while we were in session so we might consider making it March —, 1976, if you so desire. This would give all of us an opportunity to thoroughly study the bill, prepare for its operation and to decide how it might affect each of us in our personal life and in our work. And it will give the next Legislature an opportunity to adopt any necessary changes before the bill actually takes affect. As I say, I think that letter answers most of the questions that you might have. Now, a little while ago, ten or twenty minutes ago, we discussed for a short time a constitu-

tional amendment for self-defense. I object or feel that the constitutional amendment would not be the proper way to solve it for the following reasons: First of all, it would cost about $15,000 and be one more amendment on the ballot. Second, if everybody in the state of Nebraska voted in favor of that constitutional amendment it would not change my right to self-defense one bit and I wouldn't know one more about it, one more bit about it. Also, if everybody voted against it, it wouldn't eliminate one bit my right to self-defense and so the amendment in effect would do nothing. I think the statute is the proper way to do it because it does spell it out point number one. Point number two it doesn't cost the expense, time and trouble of a constutional amendment. And number three, the Legislature taking its responsible position of solving once and for all the problem of what is and what is not self-defense and so I would urge you to more the bill forward to final passage.

President: The Chair recognizes Senator Nore.

Senator Nore: I rise for the purpose of asking a question. I would like to ask Senator DeCamp—

President: Senator DeCamp, do you yield to it?

Senator Nore: Isn't the matter of self-defense a matter of common law?

Senator DeCamp: The matter of self-defense—

Senator Nore: Should be in its place with common law.

Senator DeCamp: Is absolutely a matter of common law. And what LB895 does is detail what the common law cases have held. In other words it puts it down in written

form so you don't have to research 10,000 cases to find out what it is. It says exactly in statutory language what has been developed in the common law, Herb.

Senator Nore: I don't think it is possible to put it into statutory law, common law.

President: Any further discussion of the bill? Senator Syas.

Senator Syas: Well, I would rather that someone stood up here and kind of briefed it section by section because I don't agree with all this. You know, if this was on the ballot and, of course, this is statutory, we're not talking about the other one at the moment, but I think the two are (Inaudible). I think that the self-defense law on the Constitution if it were on the ballot, it would pass high. I think the people are for it. We passed one by statute a couple of years ago and the Supreme Court naturally would go against it. You put it in the Constitution, the Supreme Court can't do anything about it. It puts it out of reach. I haven't the great faith in the courts of today, generally speaking there are some good and some bad, of course, that alot of these . . . some people have. I think you will find the average citizen today that has been disenchanted by many court actions. I still favor the constitutional amendment approach. You might say, well, the common law but then why did they cause the first one to be unconstitutional. Why do the courts talk about common law, a king can do not wrong, and then fail to back up a statuatory legislation of two years ago? They don't want it in print. It is quite obvious to me. And I want to know exactly what I am doing here. You make this bill so complicated a person could never defend himself and I think

he is entitled to defend himself. And I think right now in this United States, too much consideration is given to the thug and that type of a person. I'd like to have it gone through section by section really and know exactly what we are doir.g.

President: The Chair recognizes Senatory Kennedy. We have under discussion LB895.

Senator Kennedy: Mr. President, Mr. President, am I on?

President: Yes, sir, you're on.

Senator Kennedy: Mr. President and fellow members, I'd like to say that we had the pleasure of a year ago of being in North Dakota when they passed a similar law. I can't verify as to what was done but we were there and present that day and I think they brought it up and passed it while we were there. I think it would be well to check it but I'm sure that the self-defense law was passed in that body the day we were there. But I'm not sure what the exact content of the law. But I still think that it is a good law and it ought to be passed.

President: The Chair recognizes Senator Chambers. And then Senator DeCamp and then Senator Nore and then Senator Luedtke. Senator Chambers.

Senator Chambers: Mr. President, members of the Legislature, as Senator DeCamp pointed out and I will reiterate, this bill represents quite a bit of research and it attempts to embody the decisions that have already been handed down by various courts dealing with the issue of self-defense. The bill which was ruled unconstitutional by the Supreme Court of the State of Nebraska should never

have been passed in the first place. It was poorly drawn and seemed like it came from the street corner rather than a legislative body. It used emotional, fear and firing terminology which was unknown to the law and there is a language of the law just like there is a language of the Legislature. And for the courts to construe a bill or a piece of legislation, the closer the language of that bill is to the language which the court customarily resorts to, the better opportunity you have of having the bill upheld. This bill does not restrict the right of any man to defend himself in a situation where he has that right. It clarifies a number of issues and I think it brings sanity to an area where there was a lot of dust blowing without any clarification or edification. I don't think there is a man in this body or anywhere else in this country or in the world who needs anybody whether it be a court or legislative body to tell him when he can defend himself. If you get ready to strike me, I'll strike you prior to you striking me. If you strike me and don't disable me. I'm going to do my best to disable you. But at this point, when you cease to be the aggressor and I cease to return your attack and you are helpless as far as your attacking me and I become the aggressor then I am infringing on your right and I am no longer defending myself. I become the one who is to be ensnared by this law. We are not trying in this bady, I don't believe, to pass bills which will make it easy for one man to harm another. We want to build fences around everybodys' rights. Your rights end where my nose begins. This law, I think, would be a tribute to this Legislature. It is something that we could all, even me, point to with pride, a type of pride that we cannot customarily take in a lot of the bills that come from this body. So since a lot of research has gone into it, it codifies what

has already been stated by a court. It doesn't in any way infringe upon the common right or common sense principles of self-defense. I don't see any need for the body to tamper with it. It is not sacred. But since there is not going to be a careful reading, evaluation and analysis of every portion of it, an attempt to modify one part of it without taking it all into consideration could weaken it even leave it with inconsistencies and contradictions. This we don't want to do. So prior to anybody voting against the advancement of this bill I wish he would do himself justice and the people of the state a justice by reading it all very carefully. Any part which he does not understand, ask his favorite attorney, the Attorney General or anybody whose opinion he respects. I'm definitely for the advancement of this bill because some kind of self-defense bill will be passed by this body, probably. I think this is the most sane and rational approach we can adopt.

President: Senator DeCamp, do you care to yield to Senator Nore or did you wish to be heard at this time? Senator DeCamp.

Senator DeCamp: I would wish to yield to Senator Luedtke and anybody else who wants to and I'll wait till the end kind of like.

President: Thank you. Senator Nore, do you have another question?

Senator Nore: Yes, I do, Mr. President, of Senator DeCamp.

President: Senator DeCamp, Senator Nore is asking you a question.

Senator Nore: What was the organization that you stated that has the courage to pass this bill?

President: Senator Nore, you are going to have to pull your microphone right up on top of you.

Senator Nore: What was the organization that supported this bill?

President: He's asking what organization applauded or supported this bill.

Senator Nore: The one that I—

Senator DeCamp: I don't recall that any particular organization applauded or supported. I introduced the bill because of common sense reason to solve the issue once and for all of self-defense. I believe we need a self-defense law that spells it out. This does it.

Senator Nore: Who testified for or against the bill?

Senator DeCamp: Senator Luedtke could answer that better than I.

Senator Luedtke: May I answer that question, Senator Nore?

Senator Nore: Yes.

Senator Luedtke: This particular bill came about as the result of a request from this body on this floor. The body voted and directed the Judiciary Committee to come in with a codification of the self-defense law in the United States as it could be reflected in action in the state of Nebraska. I might go back to the bill which repealed the self-defense act which was my bill and I appeared for the bill to repeal it. Senator Batchelder, former Senator

Batchelder, at that time appeared in opposition to my bill. There was no known organization that I know of on either side and I want to advise you that at that time I came into the committee hearing holding in my hand this particular bill which was the codification of the model act and federal civil penal code which is eactly stating what this act is and it clarifies once and for all what self-defense means to all the courts in the United States and that is what the common law really means anyway. So there was no organization that I know of.

Senator Nore: If this bill has so much demands on the part of our constituents, who testified for and against this bill? Senator DeCamp?

President: Senator DeCamp.

Senator DeCamp: Mr. President, the question as I understand it, is who specifically testified for and against the bill. This was about a year ago or maybe a little more, I had two other bills that day. This bill was at the end of the day and as I recall there were not very many people in the room at all.

Senator Nore: Well, now, Senator Luedtke, you are not telling the truth. Look at your intent.

Senator DeCamp: No one appeared against it though.

Senator Luedtke: Nobody appeared for—

Senator Nore: It says Senator John DeCamp, principal introducer, and Senator Ernest Chambers. Now, let's be honest about these things—

Senator Luedtke: Well, Senator Chambers is on the committee.

Senator Nore: I'm getting tired of these things.

Senator Luedtke: He's on the committee. Well, you mean you want Senator Chambers name added? Yes, sir. I will add Senator Chambers name. I'm just refreshing my memory. But these two members are on the committee. These are two committee members. I didn't think that was significant to answer your question. There was no one else there. That is correct. This Legislature asked us to do this. We were carrying out the request of this body.

President: Senator Luedtke, will you yield the floor to Senator Proud? Senator Proud, do you care to be recognized?

Senator Proud: Yes, I just had a question for Senator DeCamp.

President: Okay, Senator DeCamp, do you yield?

Senator Proud: Senator DeCamp, to put all this in a nut shell. Is this not a bill that would define what . . . how a man can reasonably protect his property and his person?

Senator DeCamp: You have jumped ahead of me. This is exactly what I was going to say. This bill spells out what the courts, the last couple hundred years, have said what reasonable is.

Senator Proud: Well, then I would just like to say, do you remember last year, we passed that bill, I believe, introduced by Senator Batchelder and it was sometimes referred to as the shoot your neighbor law. The Legislature because of some strange quirk refused to put in there that the word "reasonable". The bill said in es-

sence, that you could use force to protect your property and a lot of people jumped up and applauded that and I would agree that you can use force to protect your property or your person under certain circumstances. But if a child is plucking a watermelon out of the patch he shouldn't be doing that but that is no good reason to kill him. And this bill I believe, does try to put a little bit of reasonableness in this. It does say that you can protect your person and your property but you have to be reasonable about it. Now, whether they should be put in the statutes is perhaps debatable but I certainly am going to support the bill at this point.

President: Senator Barnett has asked to speak next and then Senator Klaver, did you wish to be recognized? Okay sir. Senator Barnett, then Senator Klaver, then Senator Syas, then Senator Whitney, Senator Barnett.

Senator Barnett: Mr. President, members of the Legislature, I would probably like to direct these remarks to Senator Nore. Due to the fact that I am one of the legislative representatives that is serving on the recodification of the criminal codes acts in the state of Nebraska, there are four or five senators that are involved with that committee that meets about once a month with attorneys, judges and all law people. I would like to tell Senator Nore that this is not put out or advocated by the 1313 of the Metro Association. I'd like to read right from the front of the book, that is put out by the American Law Institute and it is a reprint of their proposed official draft and it is submitted by the Council to the Members. There is several states that have adopted the Model Penal Code, per se, we in the body on the Recodification of the Criminal Code here in the state of Nebraska under the direction of Judge Carter have gone into the study of this whole book and are not adopting it in whole. We are using it as a guideline. And I for one have tried to get the body to adopt it as the code for Nebraska, several times. And I think if some of the other members that are on this committee would voice their opinions they would tell you the same thing, that this Model Penal Code is a very well thought out book and I for one would like to support Senator DeCamp's bill for this purpose. I think there has been a lot of study by experts that have gone into this area and I think that we should use the word of experts sometimes instead of using our own opinion. Now, I direct these comments to Senator Nore, hoping that it might clear the air as to who this legislation might have been backed by or come from.

President: Okay the Chair, Senator Nore, do you care to respond?

Senator Nore: I would like to, Mr. President and fellow members. I'd like to say that Nebraska is one of the safest—

President: Can't hear him.

Senator Nore: Our Nebraska small communities, cities are one of the safest places in American. I think most of you read that in the World-Herald today and by a careful study that was made. And I am wondering if we need this law at all. It doesn't seem to be having too much affect on the safety of people in our large cities of the state so they do have a law of this type.

President: The Chair recognizes Senator Klaver.

Senator Klaver: Mr. President, members of the Legislature, we used to have, of course, a law which passed by one of the members of the Legislature, the Supreme Court after a lot of hesitation and a lot of hemhaws overruled the bill and said it was unconstitutional. Now, we get this bill before us again, Senator Syas asked for a paragraph by paragraph study. I don't know what a member of the Legislature has to do in order to get it done that way. Usually when a member asks for that he usually gets it. Why it wasn't done this time, I don't know. Now, somebody said that experts studied this. Of course, experts are entitled to a lot of consideration if they have spent the amount of time they say they have and it is presumed if the right kind of expert throughout the country has spent a real amount of time and can sit on this bill, we'll consider that. But if some guys from around here and if Judge Carter, and I don't think a hell of a lot of him and I never thought a hell of a lot of him when he was on the bench, I thought his decision stunk when he was on the bench and I know there was some decisions he handed down that were so one-sided that the people didn't have a chance. They were one-sided logging on either the side of insurance companies or what-not and I certainly wouldn't give any consideration to anything he says. And I don't care if he likes it or don't like it. Now, this is a very important bill and we really ought to give it a lot of consideration. Now, I think we ought to consider it paragraph by paragraph. I personally would give the experts if they were given sufficient time and is I know who they are and they have a recordization . . . that the years past they have a record of having accomplished something and their rec-

ords stand up. I would certainly give their recommendation a lot of consideration because they are entitled to it and if they stand up and they measure up to that kind of a record, they are entitled to receive the recognition and consideration that anyone with that kind of record is entitled to. Now I don't know why you don't give Senator Syas an opportunity to hear that bill so he can offer amendments to various paragraphs. And I'll be glad to listen to it and vote for it accordingly.

President: The Chair next recognizes Senator Syas. And then Senator Whitney and then Senator Stahmer.

Senator Syas: Well, I just want to say something briefly. When Senator Proud starts supporting this bill, it makes me think twice because I remember when we passed the other one how he fought it. Oh boy! How he fought it. Now, he is for something and it makes me think, maybe this isn't so good for the people. Maybe they are losing something that on self-defense. Now, the word "reasonable". I have heard on this floor time and time again. I have heard the courts say what is reasonable. It is a vague thing to me. It is hard to define. The courts, I think, in various cases have not interpreted reasonable. What is reasonable to me isn't reasonable to someone else. And yet now they are playing on words again, a lot about reasonable. I don't know if we pass the bill if we can get it through the Supreme Court or not. They seem to take a dim view of people, law-abiding people in many cases. Now, concerning the constitutional amendment which we are not debating but again, I say, is interwound. The Farm Bureau to Senator Nore . . . to Senator Nore, well, I guess he is too busy visiting that I can hardly . . . anyhow, Senator Nore, the Farm

Bureau as I recall testified for the constitutional amendment on self-defense. I think he should realize that. He says that small towns don't need it. I've been to a lot of small towns that probably don't need as much as some other cities because a mere fact of population. But even in the country I am told by farmers that there is getting to be a lot of vandalism, stealing and everything else that never used to eexist. So I think this is slowly spreading all over the state and all over the United States. So I don't think the farmer can sit there and smugly say I'm not affected. It is just a big city problem. That isn't true. It has hit all over. And I still request, for one thing before I do it, I say again that a committee chairman should put in his report who testified for and against the bill. I'm getting tired of these things coming out here on the floor and you don't know who is for and against it. Okay, I'm sorry. I read that wrong, I apologize. But I will say this that I'd like to have a section by section brief explanation of what this bill does.

President: Alright, Senator Whitney has asked next to be recognized.

Senator Whitney: Mr. President, Senator Syas asked that this bill be explained and it hasn't been explained yet so apparently you have to ask questions in order to get it explained. But I would like to ask Senator DeCamp some questions. If someone enters my home to do great bodily harm to some person in it, then in accordance with this bill, does the owner of the home or some person in it have the right to shoot with intent to kill the intruder?

President: Senator DeCamp, do you care to respond?

Senator DeCamp: Mr. President and members of the Legislature, on the basis of the facts given in that particular question, my answer is yes. And the bill would give that answer, yes. If the person were entering with the intent as you say to do great bodily harm and this is how you had to stop him to prevent this, you would have this right. However, giving simple answers to a specific case is difficult because each case has is own particular facts. Now, you can stand there and just say simply, somebody breaking in my house to do great bodily harm, would I have a right to shoot him. And I can give you a simple yes answer. There may be a whole bunch of other facts in an actual case. In other words, for instance, the man is breaking into your house to do great bodily harm, you shoot him to stop him. You wound him maybe three times, he is laying on the floor, the rule is then if he is disabled, incapable of doing anything further you can't walk over, hold the gun above his head and go bang, that settles that. At that point you would have to cease so long as you had him incapacitated and call legal authority.

Senator Whitney: I have a second question. If someone enters a farmstead for the purposes of stealing gas and oil or for the purpose of stealing calves out in the corral, does the owner of the property or the tenant that is living on that property have a right to, what rights does he have? Let's put it that way. Can he shoot with intent to kill this person who is intruding and stealing or does he not have that right?

Senator DeCamp: Senator Whitney, your whole concern seems to be whether you get to kill the man or not. This seems to be the essence of each one of your questions. You would have the right to use all the reasonable means

necessary to stop him. If it were necessary, absolutely necessary to kill him to stop him, I would say yes. However, I think as I say, that your only concern is when you get to kill the guy. I'm a little wondering about your motives.

Senator Whitney: Senator DeCamp, you have no right to question my motives. My motive is to try to find out what is in the bill. I think I have that right without my motives being questioned. And because this is a part of the bill. Now then, if obviously I have never shot anybody, I can't even shoot a calf or a horse or I don't like to shoot people or calves or animals or anything. Now, if some hoodlums are assaulting say a boy and girl sitting in an automobile, they are taking baseball bats and knocking out the windows of the car and attempting to hit the people, the occupants over the head with the baseball bat, can a by-stander come out with a shotgun and say for them to stop and if they don't stop, can he shoot the shotgun and let the pellets hit on the ground and then the pellets bounce from the ground onto the people involved without having to go to court to protect himself?

Senator DeCamp: Absolutely.

Senator Whitney: He can? Thank you.

President: Senator Stahmer. Senator Stahmer, did you wish to be recognized? Next is Senator Moylan, then Senator Moylan.

Senator Moylan: Mr. Chairman and members of the Legislature, to begin with, such a bill as this really isn't necessary. Common law has taken care of the situation over the years but due to the misconception and the lies

born by the passage of LB925 I believe it was, in 1969, which I was one of the few that opposed the passage of that bill. Since the confusion has arisen over the passage of that bill, I believe this bill is a good bill to explain to the public what is meant by the common law of self-defense. Now, I think as I say, that really there should be no reason for this bill but due to the confusion over the passage of LB925. I believe I'm right on that number. Which was declared unconstitutional by the courts later on, due to the confusion caused by the passage of that bill I think it well to pass this bill to explain to the public what the common law meant by reasonable defense for self-defense. Thank you.

President: The Chair recognizes Senator Fred Carstens.

Senator Carstens: Mr. President, will Senator DeCamp yield to a question?

President: Senator DeCamp, yield?

Senator Carstens: Senator DeCamp, is this bill for the purpose of principally guiding the courts or assorted members of the public who may be involved in self-defense acts?

President: You're on.

Senator DeCamp: The purpose is two-flod. First of all, to inform the public to what their rights are. Along with the bill, for all those that will want it in the future, will be a printed commentary explaining what each section means, what its origins in the common law were, so on and so forth. So obviously it will have a heavy purpose to inform the public and attorneys who might be informing

the public particularly as to what their rights are. It is also for the courts to the degree that if a person every challenged about his right to self-defense in a particular case, he would have the specific statutory law to point to and say this is the basis of my defense.

Senator Carstens: Now, there is still . . . I'm not opposing the bill so don't misunderstand me, I agree with the principles involved. But this bill covers twenty-one pages of detailed information, what is and what isn't, or when and when a person isn't acting in self-defense. Now, it is not likely in my judgment or do you believe that it is so voluminous that the public will never know what is in the bill because it is so long, so involved, so intricate?

Senator DeCamp: I think it is highly unlikely that any great portion of the average people will read the bill even in small detail, but the information is there for those who might need it and it is there particularly for the attorneys of the state to advise people and inform them of their rights. It also clarifies that question of just what is reasonable and what is the common law. Like so many of our bills, twenty-one pages or fifty pages are passed in here. They are not generally read in detail by the public but they are the law and they are there as guidelines or as the law for the people to know about when the need arises. I believe you are right. Obviously everybody isn't going to run out and read just what is in the self-defense law. But the essence of this law is the word reasonable as interpreted by the courts over the years. Now, to answer some other questions which have been asked by innuendo here. The constiutitional amendment can't change that one bit. But what it can do is confuse the area again and people will wonder what is self-defense and then

somebody will say, it is the common law and you'll go in the big circle you had before as to what is reasonable or unreasonable, necessary, unnecssary. I think this is the approach used if you want to solve and clarify the self-defense question.

Senator Carstens: Well, Senator DeCamp, I just happen, last Saturady night, I was reading the Lincoln Journal and I came upon a question that has come up and is vexing and perplexing people all over this land and that is the drug problem, the hard drugs, for example. And I have long had my own views and thoughts on what should be done about it but it was expressed almost perfectly by a gentleman by the name of Julian Bond from Georgia who was a member of the Georgia State Legislature. Mr. Bond said referred to (Inaudible) should take the law into their own hands to eliminate dope pushers in their neighborhood. Now, I certainly agree with him. This is how to get rid of dope pushers and he said expanding on statements he made in a speech earlier in the week, Bond said, I was quoted correctly. I did not intend execution on the street but I do encourage summary judgment in the street. In his speech he said blacks must let the cellar of poison for our children know that the price of drugs is death at the hands of the community. Now, again, I say I agree with him. Now what I am getting at is this. Under this self-defense law, if the feeding or the handing of poisonous substances for example, call it dope pushers for one and not necessarily dope pushers, the lacers of the punch bowl and a few people like that, isn't that also a sort of a crime which we are entitled to self-defense? Is this broad enough to cover that? Have we the right to defend our children? From this act.

President: Senator DeCamp, do you care to respond?

Senator DeCamp: Mr. President and members of the Legislature, I think as this body knows there is no one more concerned about the drug problem than I am. I also think that as time passes, we will solve the drug problem. I know in the past hundred years that there have been various problems that this country has encountered from bank robbers and so on and so forth, now, we have drugs as a major problem. Senator Carstens is indicating as I understand it, that his solution to the drug problem is to institute a vigilante type justice. This may be one solution. It does depart radically from the idea of law as the basis for governing and running our society. Well, I appreciate his desire to solve the problem, if his question is, does the bill allow people to go out in the streets and as he uses the word to execute those who might be involved in drugs. I would have to say no, the bill doesn't allow you to go out and execute people in the streets much as this might be one solution. The bill specifically does not allow this and I have to admit this.

President: Is there any further discussion of LB 895?

Much as this might be one solution. The bill specifically does not alow this and I'll have to admit this.

President: Is there further discussion of LB 895? Senator Klaver.

Senator Klaver: (inaudible) and introduced in Iowa whereby a fellow attempted to break and enter a farm and the farmer tried to shoot the fellow and he did and then the man recovered and went to court and filed suit and recovered some $25,000 and then took the man's

farm away from him, and the neighbors of the farmer loaned him money to appeal to the Supreme Court and the Supreme Court upheld it.

Senator ————————: I would like to answer the question. Mr. President, members of the legislature, Senator Klaver is a lawyer and as a lawyer he knows it is important to state correctly the facts of a case that he has just on the floor of this legislature totally completely misstated. The facts are the farmer set up a gun triggered to go off if anybody moved a door or window. Some person came to the place intending to do harm, to burglarize apparently. He pulled the (inaudible) the gun went off and did do harm. Now Senator Klaver also probably remembers from his earlier days in law school that this is almost one of the most famous cases. It is almost identical to one of the first cases you learn in law school. Yes, the man was sued, and yes, the man did lose. But, let's understand the principle behind it and that principle is not going to be changed whether we pass this bill or kill this bill or pass the constitutional amendment or kill it. The principle is simply this. It is not known who might come to that house. Somebody lost in a snow storm, somebody coming to knock and see who is there, so on and so forth. By putting the gun designed to go off for anybody who happened to open that door he is passing judgment and executing in effect anybody and everybody who would happen to come there. The court from 13, 14 hundred on have ruled this an unreasonable means of self-defense to protect property. Now whether you agree or disagree with this principle this oldest case and this line of reasoning has been followed. We are not about to change that rule by statute or by constitutional

amendment. I think as they say on this particular case that you brought up and probably everybody is familiar with, you should understand the reasoning behind it and what the actual facts were.

President: Is there any further discussion of LB895? Chair recognizes Senator Stahmer, and then Senator Chambers.

Senator Stahmer: Mr. President, members of the body. I think the key thing to remember in this discussion is that the legislature is as I recall last year directed the judiciary committee to come forward with this bill. As I understand it it is based on the model penal code which I think serves as an excellent basic for law. I have had the privilege of adopting a section of the code for speedy trials which this body unanimously adopted and it was mentioned on an article that was passed on your desk today by the Attorney General. I see this in ra.her the same light and I think we had some confusion before and this would help solve that confusion. I would certainly support this bill.

President: Senator Chambers

Senator Chambers: Mr. President, members of the legislature, I'm trying this time I seek to bring one point into sharp focus. There maybe variations a little (inaudible) but there is one point that I am trying to get through, and this is that ultimately a man's conduct towards another individual if it is brought before the law it is going to be construed by a Judge. Whether the law is a statute or a constitutional amendment, a Judge is going to make the final determination as to whether a man's conduct runs afoul of that particular provision or

not. If the Supreme Court of the State of Nebraska already struck down a piece of poorly drafted ineffective invalid legislation then even if that same attitude and idea is compressed into a constitutional amendment, that amendment wil be construed by the court when a case under it comes up for consideration. The court has a way to work its will regardless of what the legislature says or does. When we shrug or try to circumstance our responsibility as intelligent, deliberative men, the court is going to do our job for us. Now, a man can do anything that he wants to do provided he is willing to pay the consequences for his actions. The law sets up somewhat of a guideline as to what he can epect if he does certain things. If we pass a piece of legislation which the Supreme Court is going to annul then the individual who acts under that legislation is not going to be granted immunity from the prosecution he is going to be found guilty and convicted and sentenced regardless of what ever piece of invalid legislation says. This law, this bill, which I hope will become law has been endorsed by the Attorney General as a starting point. I realize that as far as this body is concerned the Attorney General is a handle that fits any tool which a particular legislator has from his tool chest at any given moment. But I think nobody in this body would consider Attorney General Meyer a wild-eyed radical. He may not even be considered a militant, he might be considered a conservative. Some people might consider an archconservative. Regardless of what you describe him as in term of a title or label the man is the Attorney General of the State and he will prosecute certain actions which come under statutes of the state. If there is a constitutional challenge to a provision he is

going to have to defend the action that we take. He is trying to tell the legislature that should a bill come out of this body which attempts to define and details the right of self defense, this is a bill he feels will stand the challenge of constitutionality. Somebody will know something about what rights he does have when he is in a situation where he must defend himself. If anybody reading this bill because its voluminous I don't think there is 99 I don't you could take 99% of the statutes which are in the statutes book and the citizens reads does not read these statutes. If a man is going to be struck by another man, he doesn't have time to take the statute book and see what course of action he should take, his common sense is going to tell him that if somebody was in my house and my family is there and he has no business being there, I don't care what a statute says, I don't care what this legislature says, or the Supreme Court, or anybody else, I'm going to (inaudible) him away, and I might have consequences to pay. I may win in my home but lose in the court but that is the price I have to pay for defending my family in a way that I think I should. If a man assaults me in the street or is about to bother somebody I think something of, I'll intervene to help that individual prepared to face the consequences of my actions. I think every man in this body knows basically what self defense means. You all know in addition that we are not setting up a definition of self defense for ourselves. There was a lot of confusion introduced into the state, into the thinking of the citizens and the court in making decisions on the basis of a law that was hastily passed by this body. As Senator Proud pointed out it was called the "Shoot your neighbor Law" I don't think

any bill that comes from this body could be of more use to what everybody is concerned about the criminal element than the one who is trying to defend his home legally and justifiably even with the bad bill that was passed last time nobody was prevented from defending himself or his property. Nobody was given more right but there were people from the element that this body seemed so concerned about who went out and did certain activities which this body would condem as being criminal and deterimental to law and order and these are the people who primarily made an attempt to use that so called self defense bill. It would almost justify any violence, even deadly lethal force inflicted upon another person if by some stretch of the imagination you could give the impression that you thought that you thought that certain things were occurring in his mind. It was a mind reading statute which gave you the right and in some instances to kill an individual for what you thought he was thinking. This bill is an attempt to correct all that. The court is going to construe an action which is placed allegedly in behalf of self defense no matter what we say or do the courts have the final decision and this bill attempts to head them off at the pass. It gives the legislature some idea as to what the ground rules of the court decisions will be from here on in. If we are generally concerned about this area, I feel that this bill should have been carefully read before this morning and if there were things that needed clearing up like Senator Whitney tried to have done, and I'm not questioning his motives or anybody else's, then those questions should have been asked, but to ask for a blow by blow account of each section might be unreasonable if the men in this body

have thought through this situation so carefully that they directed the judiciary committee to come forth with a bill. This is not really Senator DeCamp's bill, it's not Senator Luedtke's bill it's not the judiciary committee's bill. This represents the best thinking of the legal minds in this country. Based on the condition of the law at this time. We are not the ones who are going to construe this law, the courts are and we're being told that this is a law that they will construe in a way that protects every right of self defense that has been known to man in this country. I agree with Senator Carstens that dope pushers should be executed on the street. If a dope pusher sells my child or give him some dope then I'm going to take his head. But I know that there is now law that gives me the right to do that and I'll have to trade mine for his. This is what I feel ought to be done to somebody who threatens me and mine. This bill is not going to stop any of us from shooting first and asking questions later. It's not going to stop people from carrying pistols and see who can draw first and kill the other one. The law is not going to stop anyone from doing anything. All it is going to do is to provide a procedure after a man has taken an action the court determines whether or not he is going to suffer a penalty at the hands of the state or whether he is not. That is all the law is going to do. It doesn't create anything, and it doesn't take away anything. I believe the bill should be advanced and at this point I'm going to ask unanimous consent that my name be added to the bill. It is not Senator DeCamp's bill it does not therefore become mine. But I'm going to wrap my legislative destiny up with this bill that I think is necessary.

President: Senator Chambers has asked unanimous consent to add his name to the bill. Are there objections? Hearing none, so ordered. Senator Proud, did you wish to be recognized? We are still speaking on the advancement of LB 895.

Senator Proud: Mr. President I'm fixing to move the previous question. However if anybody objects to that I'll withdraw the motion. I'd only like to say that after all the oratory is cleared away what this bill really does, and that's not to take anything away that's been said, it doesn't really advise the public or the homeowner what he can and can't do, unless he reads the bill and we all know that there won't be one out of a thousand that is going to read this bill in the state of Nebraska. What it does do is this. When the Supreme Court decides a case involving injury to a person or to his property, the Supreme has no statutory law to go by, the Supreme Court has to look at the cases, they can look at cases in Nebraska, Maryland, the judges review all these cases and briefs that are filed, citing the cases and then they make a decision. They have no statute to guide them. I would say that this would (inaudible) research on the part of the Supreme Court because they can look at the statute and say this is what the legislature says, and that is really what the bill is all about. It is simply a guide to the supreme court. I move the previous question.

President: The previous question is moved. Do I see five hands? Question is shall the debate now close? All those in favor vote Aye, all those opposed vote No. Previous question has been moved. Have you all voted. Clerk will record the votes.

Clerk: 30 Ayes, 2 Nays and 17 Not voting.

President: The debate will now close. Senator DeCamp would you care to close on LB 895. Senator DeCamp closing.

Senator DeCamp: Mr. President, members of the legislature, I will try to brief and direct myself only to some of the objections that have been raised against the bill. Senator Syas suggested that the courts are bad, that they will let anything go, that they are not going to enforce the law. This may or may not be true. I'm not here to debate that. This does spell out what the law is though, the common law is, and that is what we are going to have to live by whether the bill passes or not. Senator Syas suggests that also I interpret it that a constitutional amendment will really solve the problem but then I have the impressions that constitutional amendments are going to be used to solve everything in this body. Anytime we have a question we whip out a constitutional amendment. As I stated before a constitutional amendment in this case isn't going to increase or decrease my right, all it will do is to create a confusion because once again people will say what is it? What does it mean? This spells it out in a statute and says what the common law is and the common law is what they are going to get back too.

As I say the essence of this bill is reasonable. You don't have to read the bill to really understand it as long as you use the criteria of reasonable. Now there is disagreement probably among any individual in here as to what reasonable would mean under particular circumstances. So what the bill does it takes what the consen-

sus of reasonable is and the majority of cases over a long period of time. In other words you might say what an average of reasonableness is in the minds of human beings in this state. Senator Nore seems to suggest that there is a devious plot on my part in introducing this bill to really take away the right of self defense. That's definitely not true. He will recall this bill was the result of a recommendation or even a command by this legislature that some form of self defense law come up, be developed and this is the reason this is the result. Others have suggested that a paragraph by paragraph study of the entire bill. I am 100% willing to do this, I estimated it will take some over 4 and 8 hours since I would read the annotations that have been developed. However, the bill has been on General File for over a year. Any individual really concerned about the problem, and if a Senator is concerned, I assume that they do their home work, they could have researched it and could have checked it out thoroughly, they could know details of this bill that I don't even know. I will just close by saying that I think the bill does resolve a problem and will heal some wounds and will spell out what the common law is and will give guidelines in this area.

President: Question is shall 895 Senator Carpenter, Senator DeCamp was closing.

Senator Carpenter: I just want to attempt to amend the bill. The bill I would presume the amendment is not a controversial one. I want to add the emergency clause and the savings clause.

Senator DeCamp: I would go along with that eagerly.

Senator Carpenter: I think that this is a highly important bill and much beyond many of us understand in the bill. I think conditions are such that the sooner we put in the law the better we all might be off.

President: Senator Carpenter has asked that the emergency and the savings clause be added to the bill. Let's take them up as separate motions. All those in favor of adding the emergency clause say Aye, those opposed say No. Ayes have it the emergency clause is added. All those in favor of adding the savings clause to LB895 say Aye, those opposed say No. The ayes have it so ordered both are added. Question is now shall LB895 with the emergency clause and the savings clause added and as amended be advanced from General File to E & R initial? All those in favor vote Aye, all those opposed vote No. Voting to advance LB895. Have you all voted? Have you all voted? Once again have you all voted? Clerk will record the votes.

Clerk: 42 Ayes, 2 Nays and 5 not voting, Mr. President.

President: The bill is advanced. Senator Carpenter.

Senator Carpenter: Permission to withdraw LB763 which is a constitutional amendment, this bill takes it place as far as I'm concerned.

President: The motion will be laid over. Well the next order of business would be the General File debate of LB172 which is Senator Carpenter's bill. Senator Carpenter.

Senator Carpenter: Mr. President, LB172 is a bill that is quite important under certain circumstances. I've

asked that the bill be held a number of times and at the present time it affects railroads to some extent, the tax commission is involved and a whole lot of other people, it is a highly involved subject and I don't want to take the time this morning to attempt to explain and maybe I couldn't anyway. I would just like to have the bill bracketed on General File for that reason. It may be necessary and it may not be necessary, I don't know.

President: Senator Carpenter has asked to bracket LB172 on General File. Are there objections? Hearing none, it is so ordered. LB 172 is bracketed. We have some other business on the desk then. Clerk will read the business.

Clerk: Read (inaudible)

President: Are there any objections? Hearing none, so ordered.

Clerk: Read Standing Committee Report.

President: Senator Holmquist.

President: Motion is to advance LB1023 as amended. All those in favor of the motion, say aye. Those opposed say no. LB1023 is amended as advanced.

Clerk: Mr. President I move for the adoption of the E & R amendments to LB650.

President: Motion is to adopt the amendment to LB650. All those in favor of adopting the amendments to 650. Those opposed say no. The ayes have it. So ordered. The amendment is adopted.

Clerk: Mr. President I move that LB650 as amended be advanced to E & R for engrossing.

President: Motion is to advance LB650 as amended. All those in favor of advancing the bill, say aye. Those opposed say no. The bill is advanced.

Clerk: Mr. President, I move for the adoption of the E & R amendments to LB343.

President: Motion is to adopt the amendments to 343. All those in favor of adopting the amendments, say aye. Those opposed say no. So ordered.

Clerk: Mr. President, I move that LB343 as amended be advanced to E & R for engrossing.

President: Motion is to advance 343 as amended. All those in favor of advancing the bill, please say aye. Those opposed say no. The bill as amended is advanced.

Clerk: Mr. President, I move for the adoption of the E & R amendments to LB 895.

President: Motion is to adopt the amendments to 895. All those in favor of adopting the amendments, please say aye. Those opposed say no. The ayes have it. The amendments are adopted.

Clerk: Mr. President a unanimous consent amendment by Senator DeCamp on page 22, strike lines 1 and 2.

President: Chair recognizes Senator DeCamp.

DeCamp: Mr. President, members of the legislature, this is a minor technical correction. This bill was originally written before the other self defense bill was repealed and the last line of this bill repeals the old self defense law, but another law already repealed it so it's not necessary. So this just strikes the repeator of the old one.

President: Any objections to the amendment? Once again, are there objections? Hearing none, so ordered. The amendment is adopted. Yes 895.

Clerk: Mr. President I move that LB 895 as amended be advanced to E & R for engrossment.

President: Is there need for further discussion of the motion? Question is shall LB 895 be advanced as amended. All those in favor of that motion, say aye. Those opposed say no. The bill as amended is advanced.

Clerk: Mr. President I move that LB1078 be advanced to E & R for engrossment.

President: If not, we'll move to the consideration of bills on Select File. Chair recognizes Senator Duke Snyder.

Senator Snyder: Mr. President, I would move for the adoption of the E & R amendments to LB650.

President: Motion is to adopt the amendments to LB650. Is there any further discussion? All those in favor of adopting the amendments, vote aye. All those opposed say no. The ayes have it. So ordered. The amendments are adopted.

Senator Snyder: Mr. President, I talked with Senator Luedtke regarding LB650. He says there are some administrative problems that he's going to need a couple days to get it checked out, so I would ask that LB650 as amended be bracketed on Select File.

President: Motion is to bracket LB 650 on Select File. Are there objections to that? Once again, are there objections? Hearing none, so ordered.

LB 343

Senator Snyder: Mr. President, I would move the adoption of the E & R amendments to LB343.

President: Motion is to adopt the amendments to LB343. Is there a need for discussion? All those in favor of adopting the amendments say aye. Those opposed say no. The ayes have it. So ordered. The amendments are adopted.

Senator Snyder: Now, Mr. President, Senator Duis has just informed me he would like to bracket LB343 for a couple days in order to provide a minor amendment to it. So I so move.

President: Motion is to bracket . . . Senator Duis.

Senator Duis: Mr. President, there are some corrective measures on where the refunding of this bill comes from the highway department and so the Department of Revenue has the corrective amendment to put on 343 so this is the reason we ask for the bracketing.

President: Very good. Once again, the motion is to bracket LB343. Are there objections? Hearing none, it is so ordered. LB343 is bracketed on Select File.

LB 895

President: Senator Snyder, 895.

Senator Snyder: Mr. President, I would move for the adoption of the E & R amendments to LB895.

President: Motion is to adopt the amendments to LB895. Is there a need for discussion? Senator Syas.

Senator Syas: Mr. President, I don't think this bill 895 is self defense act has been properly debated and after you get through with Select File today I would like to go around and raise some questions and just see what the answers really are. Or we can do it now. Whatever you want to do. Senator DeCamp.

President: Is Senator DeCamp in the chamber?

Senator Syas: Well, skip over it until he gets back.

President: Do you want to hold . . .

Senator Syas: 895, that the self defense act.

President: I assume that you're objecting to passing it on then.

Senator Syas: I'm objecting.

President: Do you want to hold it here for some debate?

Senator Syas: Hold it here for some discussion.

President: Okay. I'll

Senator Snyder: I'll just withdraw my motion to . . . I didn't make a motion to advance. I have a motion pending only to adopt the E & R amendments.

Senator Syas: The E & R amendments you can adopt them, but I don't want the bill advanced.

President: Motion is to adopt the E & R amendments to LB 895 is there need for further discussion? All those in favor of adopting the amendments to LB895, say aye. Those opposed say no. The ayes have it. So ordered. The amendments are adopted.

Senator Snyder: Mr. President, would you like a motion to bracket the bill?

President: I think we'll just pass over it, because out of courtesy to Senator DeCamp not being here. Move on to 1096.

LB 1096

Senator Snyder: Mr. President, I move for the E & R amendments to LB1096.

President: Motion is to adopt the amendments to LB1096. Is there a need for discussion? All those in favor of adopting the amendments say aye. Those opposed say no. The ayes have it. So ordered. The amendments are adopted.

Senator Snyder: Mr. President, I move that LB1096, as amended, be advanced to E & R for engrossment.

President: Motion is to advance LB1096, as amended, is there discussion? All those in favor of advancing the bill, say aye. Those opposed say no. LB1096 as amended is advanced.

LB 1302

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1302.

President: Motion is to adopt the amendments to LB 1302. All those in favor of that motion, say aye. Those opposed say no. So ordered. The amendments are adopted.

Clerk: Read Committee reports.

President: Are there any bills for introduction?

Clerk: Read.

President: Ready for bills for consideration on Select File. Chair recognizes Senator Snyder.

Clerk: Read.

Senator Snyder: Mr. President, I move that LB895 be advanced to E & R initial.

President: Motion is to advance LB895 is there any need for discussing? All those in favor of advancing the bill please say Aye, those opposed say No. So ordered. LB895 is advanced.

Senator Snyder: Mr. President, I move for the adoption of the amendments to LB1101.

President: Motion is to adopt the E & R amendments to LB1101. Is there any need for discussion? Senator Syas do you wish to be recognized?

Senator Syas: I couldn't get up here fast enough on 895 before we advanced it. That was the one the other day I had bracketed so that I also that Senator DeCamp wasn't here so he could explain it a little more thoroughly. I know he is here now. 895 isn't that the self defense act?

President: Senator Syas let's take of LB1101 and we will come back to you in a minute. Is there any we have amendments to 1101?

Senator Snyder: Adoption of amendments.

Clerk: Read amendment.

President: Vince we haven't adopted the original yet. We are adopting the E & R amendments to 1101.

Does anyone wish to speak on that motion? All those in favor of adopting the E & R amendments to 1101 please say Aye, those opposed say No. Ayes have it so ordered the amendments are adopted.

Clerk: Read amendment.

President: Chair recognizes Senator Maresh.

Senator Maresh: Mr. President, members of the legislature, what this amendment does it clarifies a thing that has been bothering me about this bill that it doesn't (inaudible) its buildings on rented farms will be classified as personal property. If a man owns his own farm and puts up a bin for grain storage, you call it real estate, but at the same time if a tenant puts up a bin on a rented farm it's called a it's classified as personal property. I think we should just take the buildings out of being tax exempt. I move that the amendment be adopted.

Clerk: Senator Barnett, Senator Keyes, Senator Burbach,

President: What's your problem Senator Keyes, for what purpose do you rise.

Senator Keyes: It's my understanding that there is a role call vote.

President: That's what I am trying to do.

Clerk: Senator Carpenter, Senator Carstens, Senator Carstens, Senator Chambers, Senator Clark, Senator Craft, Senator DeCamp etc. etc. etc.

President: Senator Waldo, How did you vote?

Clerk: 27 Ayes, 9 Nays, Mr. President.

President: LB1101 is advanced from Select File. Senator Syas, did you have a motion regarding 895? That you cared to make at this time.

Senator Syas: Yes, a

President: Just a second, Senator Schmit, for what purpose do you rise?

Senator Schmit: The reference committee has assigned LR37 to the committee on agriculture and I would like to request permission at this time to use the east chamber for a public hearing for that resolution at 12:30 on February 28, if there are no objections.

President: You are asking permission to use the east chamber on February 28 at 12:30. Are there objections? Hearing none, so ordered. Senator Syas.

Senator Syas: Clerk, this morning I thought I had the bill bracketed, but I found out that I only had it delayed and the bill was advanced so naturally now I have no other alternative than to a in order to a I received some information on this bill and I asked the other day for Senator DeCamp to explain, I have some doubts about it. In order to get some explanation, at this time whether I follow through with it or not, is immaterial. I have to make the motion that will bring the bill back to Select File for specific amendment and striking the acting clause in order to open up some debate. That is the only alternative that I have. Relunctantly I did not want to do that, but that is the only thing I could do for the present. So I so move.

President: Senator Syas on the 895, Senator Syas is asking permission to return LB895 to Select File for

specific amendment. At this point that would be to strike the enacting clause. Senator DeCamp. Motion is to return LB895.

Senator DeCamp: Mr. President, members of the legislature 895 is the self defense bill that we advanced on about a 43 to 2 vote. Senator Syas is concerned because of a memorandum that he received from a fellow named A. J. Truckler, Executive Secretary of something called the tax payers union. Mr. Truckler suggested in this memorandum that LB895 was a bad bill and he gave his interpretation of the bill and offered several examples. I wasn't given a copy of this until I got it I think from Senator Luedtke. After I read it I thought quite frankly that this was one of the most funny things that I had ever read from a legal analysis and everything else. So I worked out with a couple of the law instructors at the law school, who also thought it was the funniest thing that they had ever seen, an answer to everything raised in this memorandum. If Senator Syas wants, I will read and go through and go through an analysis of everything named in the memorandum. I would estimate that this would take a half hour to forty five minutes if that is what you want. The essence of this analysis is that Mr. Truckler doesn't know what he is talking about in his objection and really isn't qualified in this area. If Senator Syas wants this and this is the will of the body, I will certainly go ahead with it. I think Senator Luedtke will be helping me in explaining it if it is requested.

President: Motion is to return LB895 for a specific amendment that would be to strike the enacting clause. Chair recognizes Senator Nore.

Senator Nore: Mr. President, fellow members, I would like to disagree with Senator DeCamp, I think that Mr. Truckler knows absolutely knows what he is talking about.

President: Is there any further discussion of the motion? Senator Syas.

Senator Syas: He has the letter, why don't he answer the questions and then maybe everybody will be satisfied. That is all I am asking him to do. It might be a waste of time to some of you but it isn't to me. But maybe it is to some, if you don't want to hear it, turn the motion down, I'm only giving you an opportunity to know what you are doing, but frankly I might be for this bill but really right now I am confused.

President: Just a second, Senator Stahmer.

Senator Stahmer: Mr. President, members of the body, whereas I support this bill, I will support Senator Syas now in his request. I think that it is far better if there is a question on a bill to have it discussed before it gets to final reading and then it has 27 red lights on it. If there is a question in Senator Syas' mind, I think it's an important bill and not a waste of time. I think Senator DeCamp would help us all if he would help us all if he would spend some time in it. Personally I favor the bill and I'm certainly not looking forward to helping work against the bill. But if Senator Syas wants it discussed I say let's discuss it.

President: Senator Stahmer has a good point, because the Chair isn't going to allow any more discussion like to place here on final reading because there aren't

any provisions in the rule for that too. Now, Senator DeCamp.

Senator DeCamp: I'm perfectly willing to go ahead with the complete explanation of it. I merely pointed out that it will take a considerable amount of time and I wanted you to be willing to give me the time if that's it, if that is what you want.

President: Well, we have certainly got rules on the amount of time even to that regarding discussions of motions.

Senator DeCamp: Well, he can ask me a question every 10 minutes or something if he really wants this information.

President: Well, that may be the way we will have to handle it. Senator Stahmer, did you have another point.

Senator Stahmer: No.

President: Senator DeCamp, why don't you try to answer the points in the letter and within a reasonable amount of time, and I have the timer on.

Senator DeCamp: Mr. President, members of the legislature, a letter sent out by Mr. Truckler starts out and says why does Nebraska need a self defense act? The answer is to broaden the right of the average honest citizen who through no fault of his own is required to take action in case of an emergency and protect himself or others. The second point that the letter sent out by Mr. Truckler says to aid the honest citizen to when he is found to have acted justifiably in such a case with a

tremendous burden of attorneys' fees, court costs, bonding costs, loss of time, dignity and possibly incarceration while his case comes to trial or while it is resolved. OK, the first part of the answer says the document says that we need a self defense act to protect the rights of an honest citizen. Since most self defense cases arise where a person is accused of a crime, and (inaudible) there is a possibility that by broadening the right of self defense for honest citizens, you also do so for dishonest citizens. LB763 which is what Mr. Truckler which was the constitutional amendment, but I think Senator Carpenter withdrew. LB763 was a broad sweep, can only broaden the right for everyone and that be honest and dishonest alike. LB895 admittedly with complex language attempts to broaden the rights for self defense for honest citizens while at the same time narrowing it for criminals. Does anyone believe that you can selectively broaden the right of self defense for one class of persons without doing so for the other class in a constitutional amendment of 14 lines. This is simply impossible. OK, now about this problem of reimbursement for attorneys fees so on and so forth which the constitutional amendment provided. There is nothing to prohibit this legislature right now from enacting such a thing by statutes. We don't need a constitutional amendment. We have the right, if that's what you want to do this right now with a statute without spending $15,000.00 on another constitutional amendment. But, when you want to do this, ask also, why should an innocent and honest citizen be reimbursed for his expenses when he alleges self defense and wins, but you take the same citizen who alleges that he did not commit some other crime he goes to court and is proven not guilty, he

doesn't get reimbursed. So why . . . citizens be reimbursed for the expenses when he alleges self defense and wins, but you take the same citizens who alleges that he did not commit some other crime, he goes to court and is proven not guilty, he doesn't get reimbursed, so why should an innocent citizen who is erroneously convicted and sent to jail also not be compensated for his time and injury, court costs and this stuff, and then you take this step, what about the next step, which I think even Senator Stahmer has a bill, compensating all victims of crime for any loss they have sustained. It is a noble idea. It can be done by statute. But realize when you take the first step, you're going to have to take a whole bunch of other steps along the way. You set a system up in other words where the state starts paying all the attorney's fees and court costs for people involved in litigation and any criminal case pretty much. Okay, specific statements regarding LB 895. It is obvious that the person who drafted the document, the criticism does not know how to read legislation for many of his statements are entirely incorrect. First he says the bill "spells out the criminal right to sue in civil litigation for damages. Absolutely nowhere in the statute, LB 895, is this true. Section 2, subsection 2, which he claims does this provides that the statute does not affect any civil action which already exists. Now there is a civil action and common law which would exist now or if LB 895 passes or if the constitutional amendment passes. Okay, second, Mr. Trutler alleges that LB 763 does in 14 "clearly defined lines what 21 pages cannot do". So let's read carefully the language of 763 if you have it before you. There are two clauses to the proposed amendment and it says you can protect

by any reasonable means necessary, yourself, your family or your real or personal property and it goes on to say you can come to the aid of another who is in imminent danger or the victim of aggravated assault, armed robbery, hold up, rape, murder or any other highness crime. Okay, first you're looking at the amendment, you might note that the amendment does not tell you what you can protect yourself, your family or your property from. It can't be from aggravated assault or armed robbery or hold up or rape, murder or any other highness crime, because you can't read that language as modifying protection of yourself, but only protecting someone else. You have to get this interpretation because you can't go around raping property. And if this interpretation is correct, then the constitutional amendment is still a kill your neighbor bill because the following examples would very logically follow under it. First, Mr. Jones goes to the Dairy Queen and he purchases a 10¢ ice cream cone. He pays 25¢ and he gets a nickle change. Okay, when the owner refuses to give him the other dime, the purchaser pulls out a gun and shoots him to "protect his property". You say it's ridiculous but it's a very logical consequence. A criminal who is about to be arrested by a police officer shoots the police officer under the theory he was "protecting himself with force that was reasonably necessary. And if the constitutional amendment is so clear in scope, would you please tell me what a hold up, which is used in the constitutional amendment since no where in Nebraska law did you ever have the term hold up. Third, the document of Mr. Trutler says unlawful force is force employed without the consent of the person against who it is directed. Now this is just completely

false. If you read the definition in section 1, you will find that it also has to constitute an offense or actionable force. Now a word about all these remarks about the "good criminal lawyer" who can raise the substantial question. The constitutional amendment is designed to give a defense to a criminal prosecution. Thus this good criminal lawyer he talks about is really the lawyer who will be representing "the honest citizen", who the author of LB 763 is trying to protect. I think this is probably graphic evidence that the author of this document, Mr. Trutler, doesn't really know what he's talking about. Okay, fourth, Mr. Trutler's document states that deadly force may "almost never be used by citizens or policemen". So when may it be used under LB 763? Well, if the attempt is to give people a better understanding of their rights to self defense, one questions how it can really be done under LB 763. And it is true that in our society citizens should not be using deadly force which should just abondon, nor should police officers. The act LB 763 does spell out when this deadly force may be utilized. Fifth, we start the example of this. Mr. Trutler cites in his little memorandum and I'll have to read the example so you understand the answer. Okay, example 1. Mr. Trutler's example. A farmer wakes up in the *middle* of the night, his cattle are being stolen. The truck in which they are being placed is on a county road. He fires at the truck, the bullet ricochets injuring one of the or killing, one of the thieves. The farmer is in trouble. He has fired upon a vehicle, but that vehicle or his cattle are no longer upon his land. Now our farmer had no knowledge that the thieves would not fire back, therefore according to Mr. Trutler, he is in violation of section 4, subsection I, line 16-21 and then Mr. Trutler explains his theory be-

cause the actor knows that he can avoid the necessity of using force for complete safety by retreating or by surrendering possession of a thing to a person asserting a claim or right thereto or by complying with the demand that he abstain from any action which he has no duty to take. And then Mr. Trutler goes on to say you can't stop here either. Because . . .

President: You have two minutes to close if you can.

Senator DeCamp: You must do more more cross indexing to find the final answer and frankly Mr. Trutler says I don't believe there is one. Okay, answer to this hypothetical. The document is in error on all counts. First if the bullet ricochets and injures or kills one of the thieves, it may likewise kill an innocent bystander. Second, it is not true that the truck is on a county road makes any difference whatsoever. He simply hasn't read LB 895 the statute. The fact that the owner of the property is off the land is only relevant when the owner of the property willingly gives custody to another and then wants it back and is refused. Section 6, subsection 2, subsection A, makes that perfectly clear. Sections 6, subsection 1, subsection A which would clearly govern the hypothetical allows for as long as the owner is or believes himself to be in possession making the location of the property irrelevant. How much time?

President: About one minute.

Senator DeCamp: Okay. Example, second example given by Mr. Trutler. Example, this is Mr. Trutler's example, a man is held up at knife point on a downtown street. How far is this criminal prepared to go to obtain your money? The victim reacts quickly he strikes out,

the criminal falls striking his head. If he is dead or injured, the victim is in trouble. He has possibly reacted with more force than the criminal intended to use and he did not have the criminal's permission to strike back. The victim knew or might have known that the knife was only a threat, therefor by surrendering his possession and retreating, he could have avoided the injury or death of the criminal. Chances are in court, our victim would be cleared of criminal neglect or other charges, but who would pay the cost of the defense, when the smoke clears the criminal or his survivors can sue in civil court and Mr. Trutler cites section 2, subsection 2 . . . am I to the end of my minute? Am I to the end of my 10 minutes?

President: Yes, you are sir.

Senator DeCamp: Does anybody want me to go on?

President: Senator Nore, did you have a comment and then I'll ask Senator Syas.

Senator Nore: Mr. President and fellow members, yesterday we met, the folks in the Budget Committee, the state patrol and I asked them two questions. Now I said these things, you didn't, that is the state patrol, but you have two problems, one is not being able to use more unmarked cars and the other is the biggest one is the folks after they catch these criminals will get acquited. That's their big problem. And he, the state patrol said we will make that statement too. The big problem of the state patrol after they risk their lives in catching these people, they get acquitted and it's almost a nation problem and it's true all over. As a state patrolman what his biggest problem is. He risks his life to catch these people

and they get acquittal when they are guilty. I'd like to see it killed.

President: Senator Syas.

Senator Syas: Mr. President, I just want to say one thing. First, I want the President to note and quote accordingly if they will please, that I tried to open up a dialogue here, my only purpose on this bill was to do so this morning so when this bill got over in General . . . on Final Reading, you'd know what was in it and that you could vote your conviction knowing full well exactly what you're doing. But I wish to note that when this dialogue started, which Senator DeCamp cooperated with me and I thank him that the seats suddenly became empty, most of them in this chamber indicating to me in no uncertain terms that the senator had made up their minds regardless, which is their business, they didn't want any more of it, or they understand it or not, some do and probably some don't but they're going to have to live with their action and therefore, they're not interested in hearing about this bill. They're not interested in going into it any more. Therefore I'm in a futile situation. I should withdraw my motion because it will serve no further purpose. The senators are not interested in knowing what this bill so we might as well get on with something else in this legislature that they are interested in. I wish to say this is a very important bill and when you're home later and something goes wrong with this bill, I hope you're all able, to all of you answer the questions that maybe your constituents shall pose to you. I was, before this was started, I was accused of wasting time. We have certainly wasted time in this legislature on a whole

lot less than this will be after this bill is passed. Thank you.

President: You withdraw your motion. Is there any objection to . . .

Senator Syas: I withdraw it because they're not interested in debating it.

President: Is there any objection to Senator Syas withdrawing his motion? Senator Stahmer for what purpose do you rise?

Senator Stahmer: Well, since the question has been raised, I'd like to have Senator DeCamp if he could, take two or three minutes to close. He was in the middle of something, I don't know where he was.

President: Was you listening?

Senator Stahmer: Yes, I was listening. I was right here in my seat and he didn't finish and I'd like him to have a chance to make a closing statement and then we can get on with our other business. I agree with Senator Syas. I believe this is very important. I've been paying close attention. I think Senator Syas (inaudible) and I just would like to have Senator DeCamp have two or three minutes to close, he was in the middle of something.

President: How long will it take you to . . . I think Senator Syas has withdrawn his motion so there's nothing before the house.

Senator DeCamp: Mr. President, maybe I can resolve the problem just a might. I have about seven more examples. The essence of the examples in every case that Mr. Trutler in his analysis or attempted analysis of the statute

has totally completely misrepresented LB 895 and has created solutions that are totally incorrect. Now, when the legislature is asked to compare LB 763 and LB 895, it is being asked to compare one bill, the constitutional amendment which was drafted by Mr. Trutler who was responsible for the original, as they call it, not the kill your neighbor bill, he's a non-lawyer who has provided complete evidence in his draft, his analysis that he can't even interpret and read a law, let alone drafting one. He's comparing his ability then, which I think has proven to be rather poor against LB 895 which was drafted painstakingly over many years by an assembly of lawyers, judges, law professors and citizens knowledgeable in this area who are widely recognized for their expertise in this area. In this critical area where man's rights, it would seem that LB 895 does offer the better solution and does solve the problem more intelligently than resorting back again to a kill your neighbor type philosphy. Where you don't know what your rights are. And I would urge you to move ahead and stick with LB 895.

President: Thank you, Senator DeCamp. Is there any objections to Senator Syas withdrawing his motion?

CERTIFICATE

I, Vincent D. Brown, Clerk of the Nebraska Legislature, do hereby certify that the attached legislative history pertaining to LB 1278 of 1972 is a true and accurate reproduction of committee records and floor debate on file in my office.

Dated this 13th day of October, 1977 in Lincoln, Nebraska.

/s/ Vincent D. Brown
Clerk of the Legislature

INTRODUCER'S STATEMENT OF PURPOSE

LB 1278

Senator Roland Luedtke, Chairman
Committee on Judiciary

The following constitute my reasons for this bill and the purposes which are sought to be accomplished thereby: The purpose of LB 1278 is to clarify the law by making it clear that law enforcement officials who are sued for their actions while they believe they are doing their duty and enforcing the law shall be relieved of financial responsibility by specifically imposing that responsibility on the employer municipality or county. Such suits are becoming more numerous these days even though most are mere nuisance suits, and it is becoming more and more difficult and costly for individual officers to insure themselves against such suits. Our police are already too handicapped by legal technicalities to require that they place the whole financial future of themselves and their families on the line each time they seek to do the very job which we have hired and trained them to do, and their employers should stand back of them if they are attacked in the courts. This bill will loosen slightly the handcuffs our society has placed on its poicemen during the past few years.

Dated February 14, 1972

/s/ Bill Skarda

Principal Introducer

COMMITTEE STATEMENT ON LB 1278

The purpose of the bill is to clarify the law by making it clear that law enforcement officials who are sued for

their actions while they believe they are doing their duty and enforcing the law shall be relieved of financial responsibility by specifically imposing that responsibility on the employer municipality or county. Such suits are becoming more numerous these days even though most are mere nuisance suits, and it is becoming more and more difficult and costly for individual officers to insure themselves against such suits. Our police are already too handicapped by legal technicalities to require that they place the whole financial future of themselves and their families on the line each time they seek to do the very job which we have hired and trained them to do, and their employers should stand back of them if they are attacked in the courts. This bill will loosen slightly the handcuffs our society has placed on its policemen during the past few years.

Senator William Skarda, principal introducer, appeared for the bill as did Mr. Thomas Pansing, representing the Police Officers of Nebraska; Bernard Wishnow, Sheriffs Association, Lloyd W. Kilmer, Douglas County Clerk and Ralph Nelson, City of Lincoln. Mr. Pansing indicated that "such a bill was particularly needed in this intricate and sophisticated day where there have been numerous laws on arrest, search and seizure upheld by the United States Supreme Court". There was no opposition to the bill.

Mr. Pansing offered an amendment to the bill to amend section 1, line 4 by deleting the word "apparent"; amend section 1, line 5 by deleting the words "whether he be on duty or off duty,".

A motion was made to adopt the amendment submitted by Mr. Pansing. The motion carried and voting in favor

of advancing the bill to General File were Senators Carstens, DeCamp, Luedtke, Morgan and Simpson. Senators Carpenter, Chambers, and Epke were absent.

The bill was advanced to General File as amended.
February 24, 1972

/s/ Roland A. Luedtke, Chairman

LB 1491

has worked very well there. In fact, it's been improved since they got theirs. That's why it's a little bit higher than what they paid for theirs.

Senator Carpenter: Didn't we get forth in another bill the name and specifications?

Senator Luedtke: That doesn't have anything to do with this court.

Judge Novicoff: No, it doesn't.

Senator Carpenter: Unless you can use the same thing, the same specifications.

Senator Luedtke: Yes, I see what you are saying. If that would be agreeable to the judge, it would be agreeable to us. We want something that would work. Any other questions? Any others wishing to appear in favor of LB 1491? Seeing none, are there those that would oppose LB 1491? That will close the hearing on LB 1491. Senator Skarda.

LB 1278

Senator Wm. Skarda: Mr. Chairman, members of the Committee, I introduced LB 1278 at the request of Thomas Pansing, Nebraska Peace Officer, because of the difficulties

in many instances they were having down in Omaha where cases of false arrests were made and where policemen are getting involved and getting sued, where questions of insurance are hard for them to get and what it does is clarify the language in reference to who is responsible for police personnel when they get involved while on duty in reference to a lawsuit or a judgment and it puts the responsibility on the county or the municipality. That's just about how simple it is. I don't have anything further to say if Tom Pansing will make the closing for me. I'll answer any questions to the best of my ability but I notice three attorneys on the board who would likely know more than I do about what we are talking about.

Senator Luedtke: Any questions of Senator Skarda?

Thomas R. Pansing: I'm Thomas R. Pansing, representing the Police Officers Association of Nebraska, a voluntary organization of about sixteen hundred municipal police officers.

LB 1278

Fortunately for the people in this room today, one of the ex-presidents of my association died day before yesterday (sic). I guess that's the wrong way to say it but most of the people that would ordinarily be at this hearing are at the funeral at this moment in Falls City, mourning the passing of a fine old police chief. Prior to this hearing and subsequent to the introduction of the bill, I have had discussions, Mr. Chairman, with some organizations which I knew would be interested in the bill, namely the League of Nebraska Municipalities, the Nebraska Association of County Officials, specifically with the officials of Lincoln and indirectly with some in

Omaha. In response to my discussions with them, I found that by suggesting some simple amendments to the bill, . . . would the page please pass these out, and deleting about five words, I find that I can eliminate virtually all of the known opposition that I know about. To amend section 1, line 4, by deleting the word "apparent" and amend section 1, line 5, by deleting the words "whether he be on or off duty". I think that by doing this we eliminate a good deal of the opposition. I can't say that it's all eliminated, of course, because I don't know.

Now consider, just for the moment, the sorry lot of the Nebraska law enforcement officers today. Generally, he's a high school graduate making five to seven thousand dollars a year. He's called a pig, a fuzz, a screw. He's called a lot of words we can't even use in this room. He gets garbage thrown in his face. He gets spit in his face and a lot of other things that we won't mention. He gets kicked, punched, scratched. He gets beat up and shot at. He's supposed to be a nurse. He's supposed to be a wrestler. He's supposed to be a psychologist, a marital expert, a sociologist, a drug expert, a juvenile expert and he's expected never to be personally provoked. We're asking an awful lot of these policemen these days. But all this that I have mentioned is traditional. It's part of the job. A guy signs up to be a policeman or a sheriff and he knows about these risks and he's willing to take them. During the last ten to fifteen years a new problem has arisen. The United States Supreme Court has made important, but highly desirable changes in the laws of arrest and search and seizure and evidence and the like. The state and cities

have been trying very hard and were doing more and more each year in trying to train our police officers to understand those laws and to understand the sophistication of these times. But the changes which have occurred in the laws of arrest and search and seizure are so sophisticated and so intricate that constitutional lawyers argue over them and aren't sure of them. Suddenly this plain high school graduate on-the-street cop, must make split second decisions on the street at his own peril. Now unlike employers in private industry, he stands all by himself if he makes an error. Now stop and think about it for a minute. If you hire a plumber, they send a guy out and he makes a mistake and runs water down your wall and ruins your plaster. You don't sue the plumber. You go to the boss. You sue the company. They are the ones that stand it. If you get a faulty tire and your car blows and you kill somebody on the highway, you don't check back and find out who it was. They made the mistake at the Firestone or Goodyear or whatever it happened to be factory, and sue him. You sue whatever company it happened to be. This is true all through our life except in this matter of government. The whole financial future rises and falls on one good faith act made in a split second decision by a policeman. His whole life could be ruined financially. Now the number of suits are increasing. Everybody knows that. We read about it in the paper. Especially the number of spite and nuisance suits are on the rise constantly. This has become a very serious worry and a problem to the good officer, the one who wants to save his money, stay a policeman, build a home, have some savings, have a little estate of some kind. This has become a very seri-

ous problem. Our members within our association have attempted to cover themselves by buying insurance, individually. This has become more and more difficult each year because of the increase in the strike suits. The price is going up. The limits are going down on insurance. There is even a deductible now in our policies that we geet from Lloyds. It's a $350 deductible. The only real answer is group insurance by the city or county, by the governmental agency employer. Furthermore, it's in the public interest to give the public protection in the event of a good judgment. In the event that a policeman does a wrong act, injures somebody seriously, recovers a judgment, the average cop can't pay. All it does is ruin him and his family for life. The guy who was hurt and who was entitled to recovery has no place to turn. We've hired these men. We've trained them. We've underpaid them to protect us. We can't ask them to be superhuman. I make mistakes. Even senators make mistakes, I've been told. We can't ask more of them than we ask of everybody else. We need to stand back of them in good faith and at the same time, protect ourselves individually against errors, in judgment. This old idea that the "King can do no wrong" is dead. We all know it. The king can do wrong. The government should be responsible to its people for the act of its agents just like everybody else. LB 1278 will answer that problem. Now I understand there are other amendments coming in which will broaden the scope of this bill. This bill got introduced and lots of people liked the looks of it and I understand that there will be some. . . . Senator Skards left with the right to close, if it's all right with the Chairman.

Senator Luedtke: Any questions of Mr. Pansing?

Senator Simpson: We're talking about a policy. What kind of an amount would you be thinking of if the city is going to cover it and an idea of what this would cost? Do you have any idea what we are talking about in money and how big a policy?

Mr. Pansing: It would vary from city to city per officer depending on the size of the group. It would vary with the limits and you ask me what would the city of Lincoln decide on how big its limits should be. I don't know what they would do.

Senator Simpson: I was thinking maybe they would go beyond Lincoln and like the municipalities of Nebraska might have the opportunity to get under one that would. . . .

Mr. Pansing: That's perfectly possible for Lincoln to do it but I have no idea what this could possibly be.

Senator Simpson: The rates that I know about now and this is the very most expensive possible way to do it, run from the neighborhood of $25 to $55 per officer, per year. I would expect that would be cut in half by doing it on a large scale. But that is just a guess.

Senator Carpenter: On line 4, what do you mean by "apparent"?

Mr. Pansing: That is the word that is deleted in my proposed amendment.

Senator Carpenter: How about on line 12, why shouldn't we strike, for example "have the right to"?

Mr. Pansing: You mean "shall require them to"? I have no answer to that. I just thought that the city perhaps might want to decide to take that risk itself. Perhaps a small town that's got one part-time policeman might decide not to participate, I don't know.

Senator Luedtke: They might want to be self-insured.

Mr. Pansing: Might want to. I was just giving the city a broader right, that's all.

Senator Carpenter: Do you think they ought to have an insurance policy? They're willing to take the risks, then why insure. . . .

Senator Simpson: Now on the amendment which takes out some wording, it really doesn't look to me like we changed anything by taking out the wording but it looks better. The word apparent bothered everybody, so I thought it ought to go out.

Senator Luedtke: It still looks like he could be performing his duties even though he might be on off-duty time.

Mr. Pansing: I should think so.

Senator Luedtke: Any others wishing to appear in favor of LB 1278?

James Brunneman: I'm James Brunneman, chief of police, Norfolk, Nebraska, presently acting as vice-president of the Police Officers Association of Nebraska. I'm here to speak in favor of the bill as amended by Mr. Pansing. I agree with the senator that it does not exactly change the effects of the bill, that a police officer is, in

fact, on duty twenty-four hours a day and he could be acting on his so-called off-duty status. I have talked this over with the City Council, City Administrator, and Mayor and the city of Norfolk will go on record as being in favor of LB 1278.

Senator Luedtke: Any questions? Thank you very much.

Bernard wishnow: Mr. Chairman, members of the Committee, my name is Bernard Wishnow from Lincoln and I represent the Nebraska Sheriffs and Peace Officers Association, an organization consisting of about 600 members on a voluntary basis including about all the sheriffs and state troopers in the state. We are in accord with the bill and support the bill and endorse the words of Tom Pansing in support of it. We also appear in support of the amendment that Mr. Pansing has presented to you. It's my understanding that the city of Lincoln yesterday passed a resolution supporting the bill with the proposed amendment. In addition, I have with me three sheriffs, one of which is the president of our association. Two have been sued. One man had to pay for an attorney and a judgment out of his own pocket and the case of the other sheriff, his attorney's fees were paid by an insurance company; however, his deputy had to pay his own fees out of his own pocket until the County Commissioners came around afterwards and passed an appropriation to pay his fees. So, this illustrates some inconsistencies going on now as to what is being done, both with and without insurance. Of course with insurance, as Mr. Pansing indicated, there are limitations on coverage which is both harmful to the public as well as the officer that is supposed to be protected. We think

that in this respect the bill ought to be passed, get the statute of limitations out of the dispute here.

Senator Carpenter: Don't you think that you ought to put some minimum liability into this?

Mr. Wishnow: I do not, Senator. One of the reasons that makes this different than doing it strictly by insurance to the extent that cities and counties can get insurance. My guess is that it will be with limitations. This is the problem that sheriffs and peace officers and police officers are having. Limitations on insurance policies, deductibles, out-of-pocket expenses that these people in our business shouldn't have to bear.

Senator Carpenter: Well, would we leave it even though we provide that they should buy a policy? We only identify the policy in general terms. It would seem to me that it is just as important to protect the municipality as the officer.

Mr. Wishnow: Well the rationale runs this way. As far as the officer is conucerned, the city or the county should protect him to whatever extent he needs protecting. Then so that the city does not have a complete loss, let the city negotiate as best it can for whatever insurance coverage it can get. There are going to be limitations in the insurance coverage.

Senator Carpenter: Why would there be any limitations? Limitations on what?

Mr. Wishnow: On the insurance coverage: In order to fix the rates, there will have to be some determination as to, for example, limit to 100 thousand dollars per episode, which some policies now have.

Senator Carpenter: It would seem to me that any municipalities or county ought to be by law, directed to not less than 100 thousand dollars per episode for public liability.

Mr. Wishnow: Well the point is that regardless of whether the city or the county does this, it is liable up to whatever the amount of judgment is, even if it is more than 100 thousand dollars.

Senator Carpenter: That I understand. I think we ought to have some way to pay it outside of taxation.

Mr. Wishnow: The way to pay it is to negotiate the best insurance deal possible.

Senator Carpenter: There ought to be some minimum amount. There ought to be enough to protect the taxpayer.

Mr. Wishnow: I really don't know quite how to do that because there will be a competition for insurance markets and there will be various variations that will have to be negotiated for.

Senator Carpenter: What kind of insurance do you think we ought to have? Public liability and property damage?

Mr. Wishnow: It would be an indemnity form of insurance to make kood the loss of the city. I suppose rating wise, it could be somewhat the way a sheriff's individual insurance is now, running about $55 per man per year.

Senator Carpenter: I think the Committee ought to have some definition of the coverage. It ought to be

obtained to protect these people, the taxpayers. This is a broad thing and I don't think it's specific.

Mr. Wishnow: You're saying as a minimum the city should identify up to 100 thousand dollars or "x" dollars.

Senator Carpenter: For other coverage, not only should it be property damage and public liability.

Mr. Wishnow: This would cover everything, civil rights actions, false arrests, slander, you name it.

Senator Carpenter: That answers my question. The only thing we have to determine is the amount of indemnity, public liability and property damage.

Mr. Wishnow: My suggestion is against that unless the city bargains as best it can but . . .

Senator Carpenter: There is no need to bargain if you say you have to have just so much.

Mr. Wishnow: I'm not opposed to that.

Senator Simpson: Do you think that under this language the insurance company may get in the position of dictating who is going to be policemen and who is not?

Mr. Wishnow: No, but I do think the insurance company will be involved to the extent of requiring its permission before a lawsuit is settled or compromised, because it is going to be reimbursing the city for whatever money the city puts out.

Senator Simpson: I look into other areas such as truck drivers where the insurance company can tell you pretty well whether or not you're going to use a certain driver by increasing your payment for your policy if you keep such and such a person on the payroll.

Mr. Wishnow: I don't see that happening in this situation because we are not talking about a liability insurance where the insurance company would pay directly. We are talking about making whole the city or the county that has to pay in a given episode and I think it would be a little different there.

Senator Luedtke: Any others wishing to appear in favor of LB 1278?

Lloyd Kilmer: Mr. Chairman, Senators, I'm Lloyd Kilmer, the Douglas County Clerk of Omaha, Nebraska. Douglas County elected officials and employees unequivocally support the priciple of LB 1278 along with the amendments that have been suggested today, which were to make municipalities or counties liable for judgments obtained aaginst police officers based on their conduct durin gthe performance of their duty. It seems to me that in these critical and sensitive times, that all who engage in the business sector in public office, our churches and even our homes, are becoming more and more susceptible to being sued in a court of law for something that we did not do. Our church liability insurance costs are skyrocketing because somebody is always getting hurt on our church premises. A product being manufactured or distributed by our business community is being accused of being substandard or potentially injurious to the public and a lawsuit results and higher business liability insurance costs follow. Just over three years that I have served as Clerk of Douglas County, our office has issued approximately ⅓ of a million motor vehicle titles by my 24 employees in that particular department and we serve our citizens of Douglas County from five different loca-

tions. We presently have one lawsuit that is pending against us and have been threatened several times. Preparing and issuing motor vehicle titles, which is the responsibility of the County Clerk, according to the statutes of the state, is a manual operation and errors can be committed. In the event of an error, a lawsuit follows and a judgment could be rendered against the officeholder. The bonding company would then pay the injured party but then the bonding company would, could or would recover their judgment and their costs from the personal estate of the officeholder. A corporate officer enjoys unlimited liability but we as officeholders have an unlimited personal liability. I'm informed under the present law, that the County Board is not permitted to pay a liability insurance policy to protect the personal estate of its elected officials. Many elected officials that I know in Nebraska, are Douglas County Board of Commissioners and are elected officials and employes.

Mr. Jim Moylan has prepared this amendment for your consideration and may I submit it to you at this time. "If any legal action shall be brought against any County or Municipal officeholder or employee based on the conduct of such official while in the performance of his official duties, the municipality or county shall defend such officeholder or employee against such action and, if final judgment is rendered against such officeholder or employee, then such municipality or county shall pay such judgment in his behalf and shall have no right to restitution from such officeholder or employee provided that any municipality or county may have the right to indemnify itself in advance against the possibility of such loss here-

under". This finishes my testimony and I will be pleased to answer any questions that I can.

Senator Luedtke: Have you had any judgments rendered against you or any other officers of Douglas County under the political subdivisions Tort Claims Act, which is now the law in the State of Nebraska?

Mr. Kilmer: None that I know of, sir.

Senator Luedtke: I'm wondering if you're taking into consideration the immunities which prevail with regard to your position, for example, under the political subdivisions Tort Claims Act. And why do you feel that that is not sufficient?

Mr. Kilmer: I have not been advised by our County Attorney to the contrary but what such a danger exists for all the elected offiicals and county employes.

Senator Luedtke: I would be very much interested in any opinions from your County Attorney that that act does not protect you because that was my bill and we worked very diligently on that part of it and I would like to know wherein lies the witness on that with regards to County Officials.

Mr. Kilmer: And this bill is, sir?

Senator Luedtke: The political subdivisions Tort Claims Act which was, I believe, passed by the 1969 Legislature. I would be very much interested in any opinion and I would like to see the Attorney General's opinion backing him up if that is so.

Mr. Kilmer: I'm hopeful that such a law exists.

Senator Luedtke: I can assure you that such a law exists.

Mr. Kilmer: That will protect all the officeholders as well as all the employes of a county or municipality?

Senator Luedtke: The reason that it does not apply to police officers is because of the fact that there is personal liability and this law allows for such, in fact the Tort Claims Act even specifically provided that the municipalities could get insurance for police officers and this sort of thing. This was contemplated but not as to officers that you are talking about. There is a distinction, is what I am saying to you.

Mr. Kilmer: Thank you very much, sir.

Senator Luedtke: Any other questions of Mr. Kilmer? Any other persons wishing to appear in favor of LB 1278?

David Chambers: Senator Luedtke, if I may, I would like to submit an amendment that Ralph Nelson wanted to get into the record. He thought he could get here.

Senator Luedtke: Is it similar to this?

Mr. Chambers: It's not the same one you had submitted today. He would, and the city of Lincoln would support it with that amendment. I think it just broadens it to include the state of Nebraska peace officers, all officers of the state of Nebraska and then incorporates what you've got.

Senator Luedtke: It strikes the words "municipal police officers or constable or county sheriff" and inserts "in lieu thereof peace officer of the state of Nebraska governmental subdivision thereof".

Senator Carpenter: I suggest he and Jim get together out in the hall and see if they are in agreement with that.

Mr. Pansing: We have no objection to this amendment.

Mr. Chambers: May I support Mr. Pansing that we have no objection to the bill per se.

Senator Leudtke: Any others wishing to appear in favor of LB 1278? Are there any who wish to oppose LB 1278? Seeing none, Mr. Pansing, would you care to close?

Mr. Pansing: I'll waive closing.

Senator Leudtke: That will conclude the hearing on LB 1278. Senator Goodrich.

LB 1293

Senator Glenn Goodrich: Mr. Chairman, members of the Committee, my name is Glenn Goodrich, representing the 20th district. Periodically we review the salaries of state employes, state officials, judges and various other categories of people that work in the public sector and the history, for example, has been that about every two years we review the judges salaries. That's the purpose of this bill, to review the judges salaries and bring them up to date since their previous review. I have with me today Dave Tows who will pick up the balance of the

LB 1305

A motion was made and seconded to advance LB 1305 to General File. In favor of the motion were Sena-

tors Carstens, DeCamp, Luedtke, Morgan and Simpson. Senator Carpenter, Chambers and Epke were absent.

LB 1278

A motion was made to amend LB 1278. Motion Carried and a motion was made and duly seconded to advance the bill. In favor of advancement were Senators Carstens, DeCamp, Luedtke, Morgan and Simpson. Senators Carpenter, Chambers, and Epke were absent.

/s/ Roland A. Luedtke, Chairman

Judiciary Committee

Senator Syas: I'm just asking a question, I'm not saying that I know, I'm just asking a question.

Senator Stahmer: He wouldn't be freed automatically in any event, but if it would help I will I will, take the emergency clause off . . .

Senator Syas: I don't know if it would help or not, do you know Senator Luedtke?

Senator Luedtke: This spells out very clearly what his rights would be. The only thing this says is that he would have the right, in fact I think the amendment spells out even more clearly, he would have to serve the minimum amount of time for the sentence for which it was changed, and it goes beyond and even spells it out so the board of pardons would know exactly what they would have to do. I think that it really clarifies the law in this subject.

President: There seems to be a point in the E clause. Why don't you move for a reconsideration then Senator . . .

Senator Stahmer: I ask unanimous consent to take off the Emergency Clause, it is not that important to me.

President: At this point you have to reconsider it and we need 25 votes on it. If you want to move that way the Chair would accept your motion.

Senator Stahmer. Alright.

President: Question is shall the amergency clause be taken off the bill all those in favor vote Aye, those oposed vote No. Clerk will recordl.

Senator Stahmer: I would like to move to advance the bill, I would like to once again say that there was no opposition, I have talked it over with the warden, they have no opposition, I have talked it over with the warden, the committee voted the bill out unanimously, I think that it is a step forward in clarifying the law.

Clerk: 27 Ayes, 2 Nays on the reconsideration.

President: Emergency clause is taken off. Is there any further discussion of 1202? Question is shall 1202 as amended be advanced from General File to E & R initial? All those in favor vote Aye, those opposed vote No. Have you all voted? Clerk will record the votes.

Clerk: 28 Ayes, 0 Nayes on the motion to advance.

President: Bill is advanced. Move on to Senator Mahoney's 1278. Senator Skarda for what purpose do you rise.

Senator Skarda: 1273 is my bill.

President: I'm sorry, I appreciate that piece of information but on my sheeet it says Mahoney.

Speaker Hasebroock: (mass discussion, inaudible)

Clerk: Read LB 1278.

President: Senator Luedtke.

Senator Luedtke: Mr. President, members of the legislature the committee amendments deal with striking on page 2 the only page of the bill and line 4 that were apparent and on line 5 whether he be on or off duty this was brought by the police organization which was in favor of the bill. They brought in the amendment, this takes out of the bill any possibility of applying to any police officer while he is on private duty as a police officer working for somebody outside the police department.

President: Any further discussion of the committee amendment? All those in favor of adopting the committee amendments say Aye, those opposed say No. Committee amendments are adopted. Senator Skarda we to you.

Senator Skarda: Mr. President, I move that LB 1278 be advanced. Basically what it does this is developed by (inaudible) and the peace officers of the state of Nebraska because of the legal technicalities involved in the peace officers making arrests these days the (inaudible) nuisance suit and they are having difficulty getting insurance for themselves plus the responsibility and directly to the municipalities and counties in reference to this difficulty. That is what the bill does.

President: Any further discussion of the bill? Question is shall LB 1278 as amended be advanced from General File to E & R initial. All those in favor vote, Oops.

I'm sorry Senator Proud, Clerk gets in the way once in awhile.

Senator Proud: I have a question, I'm put in a position here I'm two bills over my quota on my kill motion now and I'm not going to put it on this now. I don't quite understand in a way that what is supposed to be a non-controversial bill. I do have a question of Senator Luedtke or Senator Skarda. The reason I have a question is that we have had this bill in the legislature before on a committee of which I am a member and I have a question about it and that is all it is, a question. As I understand the bill and I direct this to either Senator Skarda or Senator Luedtke if a police officer let's just use an example here so that we can kind of get this in mind, if a police officer beats up a suspect or somebody that he is arresting let's assume that in this case it is completely unjustified, he just beats him up because he likes to do it. Now, under this bill as I understand it the police officer could not be held liable in damages, is that correct? Is that the essence of the bill? In other words, if this citizen who is improperly beaten brings a suit against a police officer and a judgment is obtained against that officer, then the city has to pay it, is that correct?

Senator : That is correct the way you said it now, not the way you said it before.

Senator Proud: Alright. Now let's take another example. If a police officer in uniform and while on duty, destroys property and if he does it without cause and if the property owner sues him and gets a judgment then the city has to pay the judgment and the officer goes scot free, is that the way it is Senator Luedtke?

Senator Luedtke: I presume that if it is in the line of duty and if it is twisted and distorted to mean that the destroyed property in the line of duty and the judgment is obtained against him the city would pay for it, yes sir.

Senator Proud: Now, then, do you think that is right?

Senator Luedtke: I don't know whether that is right, but that the way this would be and that is why I think it is probably correct. Many times police officers have an instance to decide what they are going to do and what happens in the instance might destroy some property, and it might be later on when calm resumes and it may be decided that they didn't have to do it and therefore a judgment will be made against them, and I think that there should be a judgment against them in those circumstances, but the city pays it. Incidentally they do now, anyway because most of the police department pay for some insurance for malpractice type insurance to cover these types of situations, so you are paying for it anyway.

Senator Proud: Well if that is true then, what is the reason for the bill?

Senator Luedtke: Because of the fact that the law now holds the individual completely responsible and if the insurance amount is not enough or if some municipality does not have insurance under the court claims act they are not covered, and the individual can be sued but you can't get blood out of a turnip if the individual doesn't have any money. The victim is helpless to get any money.

Senator Proud: Now Senator Luedtke forgetting about the example for property, let's take the example of personal injury. Where an officer in the line of duty is making an arrest and he uses a great deal more force than is necessary. He repeatedly hits the victim over the head and causes him great physical damage and hospitalization and then the victim sues the police officer. Here again then the city has to pay for any judgment against that police officer, is that correct?

Senator Luedtke: That is correct.

Senator Proud: In that case then my question is, what incentive to the officer is there to use any restraint at all when he knows that he is protected completely.

Senator Luedtke: May I turn it around and say that the incentive here is on the city to be more careful then in the police officers they select and I assure you that if this law passes they will be very careful about the kind of police officers they have.

Senator Proud: Are you sure about that?

Senator Luedtke: Yes I am.

President: Any further discussion of the bill? Senator Schmit.

Senator Schmit: I would just like to reiterate what Senator Luedtke said that if the city isn't careful then the city should pay, and certainly the attorney and the judges in the safety of their offices can decide at a later date that undue influence and undue force was used and destruction ha occurred and whereas if they had to be out there at the instance the officer was there it certainly might have been looked at in a different light. And I think the city should be responsible and I think it is a good piece o legislation and it should be passed. I hope you give it a yes vote.

President: Senator Barnett, did you wish to be recognized?

Senator Barnett: Just a question Mr. President of Senator Luedtke and maybe you could explain, it is not in opposition, the only question I ask is, is there a purpose for not having the State Safety Patrol in here?

Senator Luedtke: I don't know if there is any purpose, this came in mainly because it came in involving the municipalities and the counties and it doesn't relate to the state patrol at all and they just didn't bring them in.

Senator Barnett: Could we possible visit about this, talk about this . . .

Senator Luedtke: Yes we could before it comes up on Select File, yes.

President: Any further discussion of the bill? Question is shall LB 1278 as amended be advanced from General File to E & R initial. All those in favor vote Aye, those opposed vote No. Voting on the advancement of 1278. Senator Orme has asked to be excused, are there any objections? Hearing none, so ordered. Clerk will record.

Clerk: 25 Ayes, 0 Nays and 24 not voting.

President: 1278 is advanced.

Clerk: Read.

President: Are there any objections to the expedition of 1347? Hearing none, so ordered.

Clerk: Read.

President: 1517 is already off General File. Well Senator Goodrich,

Senator Goodrich: Mr. President, wait just a second until Senator Marvel gets back. Senator Marvel, would

you yield to a question please? Do you remember LB1128 which was the Keep Nebraska Beautiful problem that we had,

Senator Marvel: Yes.

Senator Goodrich: That was in your judgment included in LB1504 right? There is no question what the department is—

President: You heard the motion to adopt the amendments all those in favor say aye, those opposed say No. Amendments are adopted.

Senator Snyder: Mr. President, I move that LB1452 as amended be advanced to E & R for engrossment.

President: You heard the motion to advance the bill, all those in favor say Aye, those opposed say No. Bill is advanced.

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1102.

President: Motion is to adopt the amendments to LB1102. All those in favor say Aye, those opposed say No. Amendments are adopted.

Senator Snyder: Mr. President, I move that 1102 as amended be advanced to E & R for engrossing.

President: You heard the motion to advance the bill. All those in favor of that motion say Aye, those opposed say No. Bill as amended is advanced.

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1517.

President: You heard the motion to adopt the amendments all those in favor say Aye, those opposed say No. So ordered.

Senator Snyder: Mr. President, I move that LB1517 as amended be advanced to E & R for engrossment.

President: Motion is to advance LB1517. All those in favor of advancing the Bill say Aye, those opposed say No. 1517 is advanced.

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1278.

President: You heard the motion to adopt the amendments to LB1278. All those in favor say Aye, those opposed say No. The amendments are adopted. Senator Carpenter.

Senator Carpenter: Mr. President, I want to move to bracket LB1278. The reason being is that I have been in contact with a number of law enforcement officers and those who have the responsibility in order to supplement what they originally bring about. They are very much concerned about LB 895 which has been signed into law by the Governor. This is the Self Defense act. 1278 I think and I have been advised might be germane, if this body decides to consider it later on to repeal LB895. This bill 895 is causing a great deal of hardship in some areas it is almost completely misunderstood. I have talked to Mr. Anderson who is the head of the police department in Omaha, yesterday. I have been in contact with him one or two times since then and they are in a state of complete frustration as to how this law should be enforced. It is also result probably in a note as a (inaudible) something comparable to do it. I ask that the bill be bracketed for that purpose, so that we can be bringing about a better understanding of LB895 so we can consider it if we so desire because it has been said that 1278 could be germane to the repeal of 895, if this body wants to do that after they have been contacted by people who are better informed than I am. I move the bill be bracketed.

President: Senator Carpenter asking unanimous consent to bracket 1278 on Select File. Senator Syas, do you object.

Senator Syas: No I don't. I . . .

President: Fine thank you 1278 is bracketed.

Senator Syas: Ha? I just want to say that I am for it because if you Gentlemen and Ladies will remember at the time I told you that I tried to get the sponsors of this bill to go through it and you wouldn't listen and so now we are caught in a bad bill.

It is too bad, I hope that we can fix it up.

President: Hearing no objections then, 1278 is bracketed on Select File. Senator Snyder.

Senator Snyder: Mr. President, I move for the H & R amendments be adopted on LB1245.

President: You heard the motion to adopt the amendments on LB1245. All those in favor say Aye, those opposed say No. Amendments are adopted.

Senator Snyder: Mr. President, I move that LB12-5 as amended be advanced to H & R for engrossing.

President: You heard the motion to advance the Bill as amended. All those in favor say Aye, those opposed say no. 1245 as amended is advanced.

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1253.

President: You heard the motion to adopt the amendments. All those in favor say Aye, those opposed say No. Amendments are adopted.

Senator Snyder: Mr. President, I move that 1253 as amended be advanced to E & R for engrossing.

President: You heard the motion to advance the bill as amended. All those in favor say Aye, those opposed say No. Bill as amended is advanced.

Senator Snyder: Mr. President, I move for the adoption of the E & R amendments to LB1318.

President: You heard the motion to adopt the amendments to LB1318. All those in favor say Aye, those opposed say No. Amendments are adopted.
back in order to add this clause that was left out. All those in favor vote Aye, those opposed vote No. Thank you. Clerk will record.

Clerk: 37 Ayes, Mr. President.

President: Alright . . .

Clerk: Read motion.

President: Senator Kennedy.

Senator Kennedy: I so move.

President: The motion is to return LB 1440 to Select File for a specific amendment. All those in favor vote Aye, those opposed vote No. Thank you. Clerk will record.

Clerk: 27 Ayes, Mr. President.

President: 1440 is on Select File.

Senator Kennedy: I would now ask for this amendment, this amendment would just include for the application of the claims for mileage which was left out in the original bill.

President: Any further discussion of the motion? Question is shall the amendment be adopted. All those in favor vote Aye, those opposed vote No. This is to add the amendment to LB 1440. Thank you. The Clerk will record.

Clerk: 27 Ayes on the motion to adopt.

President: The amendment is adopted. Now Senator Kennedy do you want to move the bill on?

Senator Kennedy: Yes, I would ask that the bill as amended be brought back to E & R.

President: You have heard the motion with the support to readvance LB 1440 to Select File for reengrossing. All those in favor say Aye, those opposed say No. Bill is advanced.

Clerk: Read

President: Are there objections, to Senator Carpenter unbracketing 1278? Hearing none, so ordered. Bill is unbracketed.

Clerk: Read

President: Chair recognizes Senator Fred Carstens.

Senator Carstens: Has the bill been unbracketed?

President: Yes sir, it has.

Senator Carstens: I ask unanimous consent to have the amendment added to LB 1278. Now they are found in this morning's Journal. These are amendments to LB 1278 which amend in turn the self defense bill which we passed some time ago. The operation and effect of the self defense has caused a lot of confusion and particularly in among certain people who, among people who now do not know for certain just where they stand because it is impossible to find out from reading the Self Defense Bill, as I understand it, they adjust what the right of either citizen or law enforcement officer are in the ordinary conduct of their office, or their duty. This bill has been requested by various law enforcement agencies the Chief of Police in the Omaha Police Department, the Lincoln Police Department, the State Patrol Member, and the Sheriff's Association, was put together by Mr. Pansing who is the regional director of the Crime Commission here and also for the law enforcement officers are concerned. It does not change the bill it is a definitive amendment, and I think if you look at it and see for yourself that this is what it is in fact, it was designed or a, it was defined for a what unlawful force shall mean and it will define what an offense means, and it defines what deadly force shall mean and it defines (inaudible) and it defines a dwelling and it also defines public offices. These amendments are, I understand, essential to make this bill workable at all, otherwise we are going to have a mass state of confusion where neither the public nor law enforcement officers know where they stand. I'm saying that this will correct or eliminate all the deficiencies of this bill when it is passed, but it will at least make it workable at such

time when we can get together and see what needs to be done about it if anything. I ask unanimous consent for the adoption of these amendments.

President: Question are there any objections to the adoption of the amendment? Are there any objections to the adoption of the Carstens amendment to 1278? Hearing none, so ordered. The amendments are adopted then. Are there other amendments to 1278 on the desk? Any other amendments to 1278?

Clerk: None, Mr. President.

President: Senator Carpenter, what is your pleasure regarding the bill.

Senator Carpenter: I move the bill be advanced to E & R for engrossing.

President: Motion is to advance LB 1278 as amended. All those in favor of the motion say Aye, those opposed say No. So ordered. The bill is advanced.

Clerk: Read motion.

President: Senator Carstens.

Senator Carstens: I didn't mean to go, I wanted to hold up the bill, I think that Senator Carpenter has an amendment

Senator Snyder: Mr. President, I move the adoption of the E & R amendments to LB 1249.

President: It has been moved and seconded we adopt the E & R amendments to LB 1249. Any discussion? All those in favor signify by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move that LB 1249 as amended be advanced to E & R for engrossing.

President: It has been moved and seconded that LB 1249 as amended be advanced to E & R for engrossing. Any discussion? All those in favor signify by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move the adoption of the E & R amendments to LB 1270.

President: It has been moved and seconded we adopt the E & R amendments to LB 1270. Any discussion? All those in favor signify by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move that LB 1270 as amended be advanced to E & R for engrossing.

President: It has been moved and seconded that LB 1270 as amended be advanced to E & R for engrossing. Any discussion? All those in favor signify by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move the adoption of the E & R amendments to LB 1278.

President: It has been moved and seconded we adopt the E & R amendments to 1278. Any discussion? All those in favor signify by saying aye. Those oppose say no. Carried.

Senator Snyder: Mr. President, I move that LB 1278 as amended be advanced to E & R for engrossing.

President: It has been moved and seconded that LB 1278 as amended be advanced to E & R for engrossing.

Any discussion? Al those in favor signfy by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move the adoption of the E & R amendments to LB 1302.

President: It has been moved and seconded we adopt the E & R amendments to LB 1302. Any discussion? All those in favor signify by saying aye. Those opposed say no. Carried.

Senator Snyder: Mr. President, I move that LB 1302 as amended be advanced to E & R for engrossing.

President: It has been moved and seconded that LB 1302 as amended be advanced to E & R for engrossing. Any discussion? All those in favor signify by saying aye. Thos opposed say no. Carried.

Senator Snyder: Mr. President, I move the adoption of the E & R amendments to LB 1303.

LEGISLATIVE BILL 895

Approved by the Governor March 1, 1972
Introduced by John W. DeCamp, 40th District; Ernest Chambers, 11th District

AN ACT relating to law; to provide for justification for use of force under certain conditions; to define terms; to provide severability; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. As used in this act, unless the context otherwise requires:

(1) Unlawful force shal mean force, including confinement, which is employed without the consent of the

person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status; not amounting to a privilege to use the force;

(2) Assent shall mean consent, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm;

(3) Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person ies believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use dealy force if necessary, shall not constitute deadly force;

(4) Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by this act; and

(5) Dwelling shall mean any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

Sec. 2. (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(b) Neither this act nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Sec. 3. (1) Except as provided in subsection (2) of this section, conduct is justifiable when it is required or authorized by:

(a) The law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties;

(b) The law governing the execution of legal process;

(c) The judgment or order of a competent court or tribunal;

(d) The law governing the armed services or the lawful conduct of war; or

(e) Any other provision of law imposing a public duty.

(2) Sections 4 to 11 of this act shall apply to:

(a) The use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) The use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or law or occurs in the lawful conduct of war.

(3) The justification afforded by subsection (1) of this section shall apply:

(a) When the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) When the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

Sec. 4. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.

(3) The use of such force is not justifiable under this section to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(a) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest;

(b) The actor has been unlawfully dispossessed of the property and is making a recently or recapture justified by section 6 of this act; or

(c) The actor believes that such force is necessary to protect himself against death or serious bodily harm.

(4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(1) The actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(2) A public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape shall not

be obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(5) Except as required by subsections (3) and (4) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Sec. 5. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) The actor would be justified under section 4 of this act in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;

(b) Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) The actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding subsection (1) of this section:

(a) When the actor would be obliged under section 4 of this act to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he shall not be obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person;

(b) When the person whom the actor seeks to protect would be obliged under section 4 of this act to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) Neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

Sec. 6. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) To prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property; *provided*, that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) To effect an entry or re-entry upon land or to retake tangible movable property; *Provided*, that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession; *and provided further*, that:

(1) The force is used immediately or on fresh pursuit after such dispossession; or

(2) The actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

(2) For the purposes of subsection (1) of this section:

(a) A person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless such property is movable and was and still is located on land in his possession;

(b) A person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon; and

(c) A person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(3) The use of force is justifiable under this section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(a) Such request would be useless;

(b) It would be dangerous to himself or another person to make the request; or

(c) Substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

(4) The use of force to prevent or terminate a trespass is not justifiable under this section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm.

(5) The use of force to prevent an entry or reentry upon land or the recaption of movable property is not justifiable under this section, although the actor believes that such reentry or recapture is unlawful, if:

(a) The reentry or recapture is made by or on behalf of a person who was actually dispossessed of the property; and

(b) It is otherwise justifiable under subdivision (1) (b) of this section.

(6) The use of deadly force is not justifiable under this section unless the actor believes that:

(a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) The person against whom the force is used is attempting to comit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(1) Has employed or threatened deadly force against or in the presence of the actor; or

(2) The use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

(7) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(8) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) Such device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm;

(b) Such use of the particular device to protect such property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) Such device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(9) The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may lawfully go is justifiable if:

(a) The actor believes that the person against whom he uses force has no claim of right to obstruct the actor;

(b) The actor is not being obstructed from entry or movement on land which he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) The force used is not greater than would be justifiable if the person obstructing the actor werme using force against him to prevent his passage.

Sec. 7. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

(a) The actor makes known the purpose of the arerst or belieevs that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom

he believes to be authorized to act as a peace officer;

(c) The actor belieevs that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(1) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a eprson from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(5) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful; *Provided,* that he does not believe the arrest is unlawful.

(6) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful

arrest, is justified in using any force which he would be justified in using if the arrest were lawful, if:

(a) He believes the arrest is lawful; and

(b) The arrest would be lawful if the facts were as he believes them to be.

(7) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummatng the commssion of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(a) Any limitations imposed by the other provisions of this act on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(b) The use of deadly force is not in any event justifiable under this subsection unless:

(1) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(2) The actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned,

in any particular manner that the law may require, that such force will be used if they do not obey.

(8) The justification afforded by subsection (7) of this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Sec. 8. The use of force upon or toward the person of another is justifiable if:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or

(2) The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

(a) The actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and

(b) The degree of force, if it had been used by the

parent or guardian of the minor, would not be unjustifiable under subdivision (1) (b) of this section;

(3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the incompent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(b) Such force is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme or unnecessary pain, mental distress, or humiliation;

(4) The actor is a doctor or other therapist or a person assisting him at his direction, and:

(a) Such force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and

(b) Such treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent;

(5) The actor is a warden or other authorized official of a correctional institution, and:

(a) He believes that the force used is necessary for the purpose of enforcing the lawful rules of procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is the result of ignorance or mistake as to the provisions of this act, any other provision of the criminal law, or the law governing the administration of the institution;

(b) The nature or degree of force used is not forbidden by section 3 or 4 of this act; and

(c) If deadly force is used, its use is otherwise justifiable under this act;

(6) The actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction, and;

(a) He believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of th execution of a lawful order, unless such belief in the lawfulness of the order is erroneous and such error is the result of ignorance or mistake as to the law defining such authority; and

(b) If deadly force is used, its use is otherwise justifiable under this act; and

(7) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and:

(a) He believes that the force used is necessary for such purpose; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, bodily harm, or extreme mental distress.

Sec. 9. (1) The justification afforded by sections 4 to 7 of this act is unavailable when:

(a) The actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) His error is the result of ignorance or mistake as to the provisions of this act, any other provision of the criminal law, or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 3 to 8 of this act but actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under sections 3 to 8 of this act in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Sec. 10. Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which establish a defense of privilege in a civil action based thereon, unless:

(1) This act or the law defining the offense deals with the specific situation involved; or

(2) A legislative purpose to exclude the justification claimed otherwise plainly appears.

Sec. 11. (1) In any prosecution based on conduct which is justifiable under this act, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this act does not abolish or impair any remedy for such conduct which is available in any civil action.

Sec. 12. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 13. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

LEGISLATIVE BILL 1278

Approved by the Governor April 8, 1972

Introduced by William Skarda, Jr., 7th District; Eugent T. Mahoney, 5th District

AN ACT to make municipalities or counties liable for judgments obtained against police officers, constables, sheriffs or deputy sheriffs based on conduct during apparent performance of law enforcement duties; to permit municipalities and counties to purchase indemnification insurance therefor; to provide that there shall be no rights of restitution or subrogation against the official; to amend section 1, Legislative Bill 895, Eighty-second Legislature, First Session, 1971; to define terms; and to repeal the original section, and also section 23-1716, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. If any legal action shall be brought against any municipal police officer or constable, or county sheriff or deputy sheriff, based upon the conduct of such official while in the performance of law enforcement duties, the municipality or county which employs such official shall defend such official against such action and if final judgment is rendered against such official then such municipality or county shall pay such judgment in his behalf and shall have no right to restitution form such official. Any municipality or county shall have the right to purchase insurance to indemnify itself in advance against the possibility of such loss under the provisions of this section, and the insurance company shall have no right of subrogation against the official.

Sec. 2 That section 1, Legislative Bill 895, Eighty-second Legislature, First Session, 1971, be amended to read as follows:

Section 1. As used in this act, unless the context otherwise requires:

(1) Unlawful force shall mean force, including confinement, which is employed without the consent of the person against whom it is directed and the employement of which constitutes an offense or actionable tort or would constitute such ofense or tort except for a defense such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status; not amounting to a privilege to use the force;

(2) Assent shall mean consent, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm;

(3) Deady force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if inecessary, shal not constitute deadly force;

(4) Actor shall mean any person wheo uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by this act, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions; and

(5) Dwelling shall mean any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging; and

(6) Public officer shall mean any elected or appointed officer or employee of the State of Nebraska or its political subdivisions, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions.

Sec. 3. That original section 1, Legislative Bill 895, Eighty-second Legislature, First Session, 1971, and also section 23-1716, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-345

JOHN MOATS and ROBERT J. ROCKWELL,

Petitioners,

vs.

LESLIE LANDRUM, Special Administratrix of the Estate of Roy Lee Landrum, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

From the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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JOHN MOATS and ROBERT J. ROCKWELL,

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On Petition for Writ of Certiorari to the Supreme Court of the United States

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RESPONDENT'S BRIEF IN OPPOSITION

—o—

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in *LANDRUM v. MOATS, et al.,* No. 77-11656, is reported at 576 F. 2d 1320. The Memorandum Opinion of the U. S. District Court for the District of Nebraska is at Appendix B of Petitioners' Brief.

Respondent opposes the granting of certiorari on the grounds that the judgment of the Eighth Circuit entered on May 30, 1978, is clearly correct with respect to its constitutional results and its interpretation of Neb. Rev. Stat. § 28-839. The granting of certiorari would only serve the purpose of rendering an advisory opinion and cause Respondent to suffer the burden of an unnecessary appeal.

———o———

QUESTIONS PRESENTED FOR REVIEW

(1) Is the use of deadly force by a police officer against a nonviolent fleeing felon unreasonable per se, thereby violating the Fourth, Fifth and Fourteenth Amendment rights of the individual.

(2) Did the United States District Court for the District of Nebraska, and the Eighth Circuit Court clearly err in finding police officers to be encompassed by Neb. Rev. Stat. § 28-839.

———o———

ARGUMENT

I. The Eighth Circuit's decision that a police officer's use of deadly force to arrest a nonviolent fleeing felon is unconstitutional is clearly correct and respondent ought not be burdened by unnecessary additional appeals.

A. The decision of the Eighth Circuit Court is clearly grounded upon a deprivation of constitutional rights separate and distinct from petitioners' violation of state law.

To recover under 42 U. S. C. § 1983, Plaintiff must show that an articulable, independent, constitutional right has been violated by the Defendant. See, e. g., *Jones v. Bombeck,* 375 F. 2d 737 (3d Cir. 1967); *Shaffer v. Jennings,* 314 F. Supp. 588 (E. D. Pa. 1970). A violation of state law or state created rights is not actionable under § 1983 unless Defendant's conduct also transgresses an independent constitutional right. *California v. LaRue,* 409 U. S. 109 (1972); *Miller v. Carson,* 563 F. 2d 757 (5th Cir. 1977); *Sauls v. Hutto,* 304 F. Supp. 124 (E. D. La. 1969).

The Eighth Circuit Court's decision, in the light of the governing principles of § 1983 litigation, shows that the Court found the use of deadly force, under the circumstances established by Plaintiff, to be constitutionally impermissible, but had stated that to recover under § 1983, Plaintiff must show violation of a specific, identifiable constitutional right. *Landrum v. Moats,* 576 F. 2d 1320, 1324 (8th Cir. 1978) (hereinafter cited Landrum). It found the right involved in this case to be the fundamental right to life. Id. at 1324. See also, *Mattis v. Schnarr,* 547 F. 2d 1007 (8th Cir. 1976), vacated, sub nom., *Ashcroft v. Mattis,* 431 U. S. 171 (1977) (hereinafter cited Mattis). The Court readopted the reasoning of its decision in *Mattis v. Schnarr,* that the right to life was fundamental and protected from unreasonable takings by the Due Process Clause of the Fourteenth Amendment.

Landrum, supra, at 1324 (citing *Mattis,* supra, at 1017-20).

The Court then proceeded to a discussion of Neb. Rev. Stat. § 28-839, the basis of Respondent's pendent state claim. *Landrum,* supra, at 1323-24, 1325-27.

The Court then addressed the question of available defenses in § 1983, noting that federal law not state law governed actions brought under § 1983. *Landrum,* supra, at 1327-28, N. 14-15.

A holding that violation of state law by police officers is unconstitutional per se, would conflict with prior holdings in the Eighth Circuit which have expressly rejected such a contention . *Sigler v. Lowrie,* 404 F. 2d 659 (8th Cir. 1968); *Mueller v. Powell,* 203 F.-2d 797 (8th Cir. 1953). Therefore, in light of the general rules governing § 1983 actions, the statements of the Court in *Landrum,* and precedents in the Eighth Circuit, it is clear that the decision reached by the Eighth Circuit was that the use of deadly force is constitutionally limited to the rules set forth in the Model Penal Code § 3.07, adopted as Neb. Rev. Stat. § 28-839. See, *Mattis v. Schnarr,* supra at 1020.

B. The use of deadly force to arrest a nonviolent fleeing felon is a deprivation of the victim's constitutional rights under the Fourth, Fifth and Fourteenth Amendments.

Although there are several different approaches to constitutional analysis of deadly force rules, two particular approaches seem most appropriate. See generally, COMMENT, DEADLY FORCE TO ARREST, TRIGGERING CONSTITUTIONAL REVIEW, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 361 (1976).

The Fourth Amendment controls on searches and seizures, see *Jenkins v. Averett,* 424 F. 2d 1228 (4th Cir. 1970) and substantive analysis under the Due Process Clause of the Fourteenth Amendment, see *Mattis v. Schnarr,* supra, Cf. *Roe v. Wade,* 410 U. S. 113 (1973).

The Fourth Amendment protects the individual from arbitrary and unreasonable interference by police officers, *Mapp v. Ohio,* 367 U. S. 643 (1961). This shield extends to citizens on the street, *Terry v. Ohio,* 392 U. S. 1 (1968), and protects the individual's physical integrity from arbitrarily inflicted injury. *Screws v. U. S.,* 325 U. S. 91 (1945); *Brazier v. Cherry,* 293 F. 2d 401 (5th Cir. 1961), cert. denied, 368 U. S. 921 (1961); *Jackson v. Martin,* 261 F. Supp. 902 (N. D. Miss. 1966). Brutality and conduct that "shocks the conscience" are prohibited by the strictures of the Fourth Amendment, see, e. g., *Jones v. Marshall,* 528 F. 2d 132 (2nd Cir. 1975), but the protections extend to considerably less gruesome police conduct. See, e. g., *Beck v. Ohio,* 379 U. S. 89 (1964).

For police conduct to be permissible under the Fourth Amendment, the power granted must be narrowly drawn and designed only to effectuate the pressing state need without undue intrusion on individual rights. *Terry v. Ohio,* 392 U. S. 1 (1968). Compare, *Sibron v. New York,* 392 U. S. 40 (1968).

Whatever state interests may be asserted by Petitioners, it is unquestionable that a deadly force rule extending to nonviolent fleeing felony *suspects* is not nar-

rowly drawn. Cf. *Jenkins v. Averett,* supra; *Carter v. Carlson,* 447 F. 2d 358 (D. C. Cir. 1971), rev'd on other grounds sub. nom., *District of Columbia v. Carter,* 409 U. S. 418 (1973), *Sauls v. Hutto,* supra.

Under a substantive due process analysis, once it is demonstrated that certain fundamental rights are involved, state rules which infringe these rights must be justified by a compelling state interest served by legislation narrowly drawn to express only the legitimate interests at stake. See, e. g., *Roe v. Wade,* 410 U. S. 113 (1973); *Moore v. City of East Cleveland,* 431 U. S. 494 (1977). See also, *Cleveland Board of Education v. LeFleur,* 414 U. S. 632 (1974). Again, whatever interests Petitioners may assert, it is clear that the use of deadly force to arrest any nonviolent fleeing felony suspect is not sufficiently narrow in scope. Such a rule encompasses within its ambit tax evaders, embezzlers, and teenagers smoking marijuana, as well as killers, kidnappers, and rapists.

Because there can be little doubt that the rule which results from the Eighth Circuit's holding in *Landrum* is the correct one, contra, *Jones v. Marshall,* 528 F. 2d 132 (2d Cir. 1975); *Wiley v. Memphis,* 548 F. 2d 1247 (6th Cir. 1977), cert. denied, 98 S. Ct. 65; *Cunningham v. Ellington,* 323 F. Supp. 1072 (W. D. Tenn. 1971); a review of the decision would be little more than an advisory opinion, Cf. *Chicago & So. Airlines v. Waterman S. S. Corp.,* 333 U. S. 103 (1948); *Rescue Army v. Municipal Court,* 331 U. S. 549 (1947); *Hayburn's* case, 2 Dall. 409 (1792), causing unnecessary burden and expense to Respondent. Therefore, certiorari ought to be denied.

II. The Eighth Circuit's interpretation of Neb. Rev. Stat. § 28-839, in view of the absence of any interpretation by the state's highest court or clear expressions of legislative intent, was reasonable and certiorari ought to be denied.

It is a clearly settled rule that where there is no decision by the state's highest court on a particular issue of state law, the federal court must apply what it finds to be the state law after giving due regard to all of the sources which the state's highest court would look to resolve the dispute. *Commissioner v. Estate of Bosch,* 387 U. S. 456 (1967); *Roginsky v. Richardson-Merril, Inc.,* 378 F. 2d 832, 851 (2nd Cir. 1967), see, Rules of Decision Act, 28 U. S. C. § 1652.

The Eighth Circuit reviewed the sources to which Petitioners refer in their Brief, Petitioner's Brief at 16, C-92, 93, 96, 97; with the language of the applicable statutes, Neb. Rev. Stat. § 28-833 (4), § 28-839 (3) (b) and determined that the use of the phrase "peace officer" in Neb. Rev. Stat. § 28-839 (3) (b) controlled over the general exclusion of law enforcement officers effected by Neb. Rev. Stat. § 28-833 (4). *Landrum v. Moats,* 576 F. 2d 1320, 1325-26 (8th Cir. 1978). (Set forth in Petitioner's Brief at B-3, 4).

Given the complete absence of legislative or state judicial guidance on the issue, the Eighth Circuit chose to let stand the judgment of the Federal District Court Judge who was more personally acquainted with Nebraska law and the methods of its courts. See, e. g., *Bernhardt v. Polygraphic Co.,* 350 U. S. 198 (1956); *Huddleston v. Dwyer,* 322 U. S. 232 (1944).

Given the historical trend towards strictly limiting the use of deadly force in law enforcement, see, generally, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566 (1961); the adoption of the Model Penal Code by the Nebraska Legislature, compare Model Penal Code § 3.07 with Neb. Rev. Stat. § 28-839, and the absence of state judicial or legislative guidance on the question, the decision of the Eighth Circuit is proper and reasonable.

———o———

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Philip M. Kneifl, one of the attorneys for Respondent, Leslie Landrum, Special Administratrix of the Estate of Roy Lee Landrum, Deceased, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of September, 1978, I served three (3) copies of the foregoing Respondent's Brief in Opposition on Mr. James E. Fellows and Mr. Timothy M. Kenny, Omaha/Douglas Civic Center, 1819 Farnam Street—Suite 804, Omaha, Nebraska 68102.

It is further certified that all parties required to be served, have been served.

/s/ PHILIP M. KNEIFL
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